Supreme Court, U.S.
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No. 98-6

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1998

EL PASO NATURAL GAS COMPANY; CYPRUS FOOTE MINERAL COMPANY; AND CYPRUS AMAX MINERALS COMPANY,

PETITIONERS,

v.

LAURA NEZTSOSIE; ARLINDA NEZTSOSIE; AND ZONNIE MARIE DANDY RICHARDS, INDIVIDUALLY AND AS REPRESENTATIVE OF THE ESTATE OF HAROLD J. RICHARDS, SR.,

RESPONDENTS.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

JOINT APPENDIX

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PETITION FOR A WRIT OF CERTIORARI FILED JUNE 26, 1998
CERTIORARI GRANTED OCTOBER 13, 1998

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RELEVANT DOCKET ENTRIES

UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

No. CIV 96-0049-PCT-RGS

EL PASO NATURAL GAS COMPANY
v.
LAURA NEZTSOSIE and ARLINDA NEZTSOSIE

Date	No.	Description
1/5/96	1	COMPLAINT FILED (ms) [Entry date 01/10/96]
1/5/96	2	MOTION for preliminary injunction by pla El Paso Natural Gas [2-1] (ms) [Entry date 01/10/96]
1/5/96	3	STATEMENT OF FACTS by pla El Paso Natural Gas re motion for preliminary injunction by pla El Paso Natural Gas [2-1] (ms) [Entry date 01/10/96]
2/14/96	6	MOTION to dismiss plas complaint for injunctive relief and declaratory judgment by dft Laura Neztsosie, dft Arlinda Neztsosie [6-1] (tmc) [Entry date 02/10/96]

2/14/96	7	MEMORANDUM by dft Laura Neztsosie, dft Arlinda Neztsosie in support of dfts motion to dismiss plas complaint and in opposition to plas application for preliminary injunction [6-1], [2-1] (tmc) [Entry date 02/16/96]
3/8/96	10	SUPPLEMENTAL by dfts Brief in response to plas complaint for injunctive relief (tmc)
3/12/96	12	RESPONSE by pla El Paso Natural Gas to motion to dismiss plas complaint for injunctive relief and declaratory judgment by dft Laura Neztsosie, dft Arlinda Neztsosie [6-1] (tmc)
3/12/96	12	REPLY by pla El Paso Natural Gas to response to motion for preliminary injunction by pla El Paso Natural Gas [2-1] (tmc)
3/27/96	13	SURREPLY by pla El Paso Natural Gas to dfts' supplemental brief [10-1] (ms) [Entry date 03/28/96]
5/28/96	15	MINUTE ENTRY Judge Inits: RGS Crt Rptr: M. SANCHEZ granting in part motion to dismiss plas complaint for injunctive relief and declaratory judgment by dft Laura Neztsosie, dft Arlinda Neztsosie [6-1]. ORD denying in part motion for preliminary injunction by pla El Paso Natural Gas [2-1] FUR ORD that pltf post bond in the amount of $1,000. See transcript of details. [15] (qo) [Entry date 05/29/96]

11/6/96	29	ORDER by Judge Roger G. Strand: denying plas request for preliminary injunction and granting limited injunction; approving cash bond in the amount of $1,000.00 in support of this injunction pursuant to FRCP 65(c) (cc: all counsel) re: order [29-1] (tmc)
11/14/96	30	NOTICE of Preliminary Injunction Appeal by El Paso Natural Gas from District Court order [29-1] (cc: all counsel/9CCA/RGS (jw) [Entry date 11/15/96]

UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

No. CIV 96-01524-PCT-RGS

CYPRUS FOOTE MINERALS COMPANY
v.
ZONNIE MARIE DANDY RICHARDS

Date	No.	Description
6/25/96	1	COMPLAINT FILED (ms) [Entry date 06/27/96]
6/25/96	2	MOTION for preliminary injunction by plas [2-1] (ms) [Entry date 06/27/96]
8/2/96	5	ANSWER by dft Zonnie Marie Dandy Richards (rew) [Entry date 08/07/96]
8/2/96	6	RESPONSE (Memorandum of points and authorities in support of dft's opposition) by dft Zonnie Marie Dandy Richards to motion for preliminary injunction by plas [2-1] (rew) [Entry date 08/07/96]
8/2/96	7	DECLARATION of David K Ringwood by dft Zonnie Marie Dandy Richards in support of response in opposition [6-1], re motion for preliminary injunction by plas [2-1] [2-1] (rew) [Entry date 08/07/96]

8/12/96	8	REPLY MEMORANDUM in support by all plas to response to motion for preliminary injunction by plas [2-] (rew) [Entry date 08/14/96]
11/26/96	10	ORDER by Judge Roger G. Strand granting in part and denying in part motion for preliminary injunction by plas [2-1]; cash bond approved in the amount of $1000.00 in support of this injunction pursuant to FRCvP 65(c) (cc: all counsel/finance) (rew) [Edit date 11/26/96]
11/27/96	11	NOTICE of Interlocutory Appeal by Cyprus Foote Mineral, Cyprus Amax Minerals from District Court order [10-1] (cc: 9CCA/cnsl/RGS) (rew) [Entry date 11/29/96]
11/27/96	12	NOTICE by all plas of filing cash bond in support of injunction (rew) [Entry date 11/29/96]

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 96-17121

EL PASO NATURAL GAS COMPANY
v.
LAURA NEZTSOSIE and ARLINDA NEZTSOSIE

No. 96-17139

CYPRUS FOOTE MINERALS COMPANY and
CYPRUS AMAX MINERAL COMPANY
v.
ZONNIE MARIE DANDY RICHARDS

Date	Description
11/26/96	DOCKET CAUSE AND ENTERED APPEARANCES OF COUNSEL, CADS SENT (Y/N): YES. Preliminary Injunction appeal. Briefing to be established pursuant to Cir. R. 3-3. CADS is past due; CADS must be filed no later than 12/3/96 for Christopher Robbins. [96-17121] (dl) [96-17121]
12/4/96	DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL. CADS SENT (Y/N): YES. Briefing to be established by MoAtt pursuant to Cir.R.3-3. This is an appeal from an order re: a Preliminary Injunction. [96-17139] (dl) [96-17139]

12/6/96	Filed aplts' joint motion to consolidate preliminary injunction appeals and to consolidate briefing schedules in 96-17121 & 96-17139; [96-17121] served on 12/5/96 to (MOATT). [3132999] (jr) [96-17121]
12/6/96	Filed aplts' joint motion to consolidate preliminary injunction appeals and to consolidate briefing scheduled in 96-17121 & 96-17139; [96-17139] served on 12/4/96 to (MOATT). [3133007] (jr) [96-17139]
12/16/96	Rec'd aplts' (El Paso Natural Gas, Cyprus Foote, et al) joint brief in 15 copies 21 pages & 5 excerpts of record in 2 volumes (Informal: no) deficient need motion to consolidate and corrected proof of service; served on 6/12/96. Notified csl. [96-17121, 96-17139] (jr) [96-17121 96-17139]
12/31/96	Filed order MOATT (SL) granting aplts unopposed joint motion to cons cases 96-17121 and 96-117139. The brfg schedule established in 96-17139 shall govern these cons appeals. Aplts jt brf, excerpts of record are due 12/26/96; aples' brf due 1/23/97; ROA is due 1/30/97; rpy brf is due 14 days from svc of the aples brf. [96-17121, 96-17139] (ot) [96-17121 96-17139]
1/8/97	Received Appellant El Paso Natural Gas in 96-17121, Appellant Cyprus Foote Mineral in 96-17139's satisfaction of (major) brief deficiency (amended proof of service of opening brief, served 12/13/96) (Inserted in brief) [96-17121, 96-17139] (em) [96-17121, 96-17139]

1/8/97 Filed original and 15 copies Appellant El Paso Natural Gas in 96-17121, Appellant Cyprus Foote Mineral in 96-17139, Appellant Cyprus Amax Minerals in 96-17139 opening brief (Informal: n) 21 pages and five excerpts of record in 2 volumes; served on 12/13/96 [96-17121, 96-17139] (em) [96-17121, 96-17139]

1/13/97 Filed original and 15 copies aples' joint 24 page brief; served on 1/9/97. [96-17121, 96-17139] (jr) [96-17121 96-17139]

1/29/97 Filed original and 15 copies aples' joint reply (Informal: no) 18 pages; served on 1/27/97. [96-17121, 96-17139] (jr) [96-17121, 96-17139]

5/5/97 ARGUED AND SUBMITTED TO Harry PREGERSON, Warren J. FERGUSON, Andrew J. KLEINFELD [96-17121, 96-17139] (mlm) [96-17121, 96-17139]

2/11/98 FILED OPINION: AFFIRMED in part, REVERSED in part, and REMANDED. (Terminated on the Merits after Oral Hearing; Affirmed (in part) and Reversed (in part); Written, Signed, Published. Harry PREGERSON, author; Warren J. FERGUSON; Andrew J. KLEINFELD, dissenting) FILED AND ENTERED JUDGMENT. [96-17121, 96-17139] (jr) [96-17121, 96-17139]

2/25/98 [3401655] Filed original and 40 copies Appellant Cyprus Foote Mineral and Cyprus Amax Minerals 96-17139 petition for rehearing with suggestion for rehearing en banc 16 p.pages, served on 2/24/98 (counsel to sent amended cert of service indicating

date) PANEL AND ACTIVE JUDGES [96-17139] (em) [96-17139]

2/25/98 [3402252] Filed original and 40 copies aplt's petition for rehearing with suggestion for rehearing en banc 19 pages; served on 2/25/98 to (PANEL & ALL ACTIVE JUDGES). [96-17121] (jr) [96-17121]

4/27/98 Filed order amending opinion and denying pet for rhrg en banc and amended opinion (Judges Harry PREGERSON, author, Warren J. FERGUSON, Andrew J. KLEINFELD, dissent) (Orig. opinion id: [3392495-1] in 96-17121, [3392495-1] in 96-17139) [3402252-1] in 96-17121, [3401655-1] in 96-17139 [96-17121, 96-17139] (gail) [96-17121 96-17139]

5/5/98 Filed aplts' motion to stay mandate pending filing of petition for writ of certiorari; [96-17121, 96-17139] served on 5/4/98 to (PREGERSON). [3445943] [96-17121, 96-17139] ORIGINAL & COPIES REC'D (hard copies) (jr) [96-17121 96-17139]

5/6/98 Filed aples' opposition to motion to stay mdt; served on 5/5/98 to (PREGERSON). [96-17121, 96-17139] (jr) [96-17121 96-17139]

6/12/98 Filed order (Harry PREGERSON) plaintiff-aplts' motion to stay the mandate pending petition for writ of certiorari is granted. [3445943-1] in 96-17121, 96-17139 [96-17121, 96-17139] (jr) [96-17121 96-17139]

7/6/98 Rec'd ntc from Supreme Court; petition for certiorari filed. Supreme Court No. 98-6; filed on 6/26/98 & placed on the dkt 6/29/98 [96-17121, 96-17139] (jr) [96-17121 96-17139]

10/16/98 Received notice from Supreme Court, petition for certiorari GRANTED on 10/13/98. Supreme Court No. 98-6 (PANEL) (sm) [96-17121 96-17139]

IN THE UNITED STATES DISTRICT COURT
IN AND FOR THE DISTRICT OF ARIZONA

EL PASO NATURAL GAS COMPANY,
a Delaware corporation,

Plaintiff,

v.

LAURA NEZTSOSIE and ARLINDA NEZTSOSIE,

Defendants.

No. CIV 96-0049-PCT-RGS

COMPLAINT FOR INJUNCTIVE RELIEF
AND DECLARATORY JUDGMENT

EL PASO NATURAL GAS COMPANY ("EPNG"), by and through counsel undersigned, states the following in support of its Complaint for Injunctive Relief and Declaratory Judgment:

JURISDICTIONAL ALLEGATIONS

I.

EPNG is a Delaware corporation, licensed to do business, and doing business, in the State of Arizona.

II.

Laura Neztsosie and Arlinda Neztsosie are enrolled members of the Navajo Indian Tribe and reside on the Navajo Nation Reservation near Tuba City, Arizona.

III.

This Court has jurisdiction over this dispute pursuant to 28 U.S.C. §§ 1331, 1332, 1337, and 2201, *et seq.* Furthermore, either the relief sought by Plaintiff herein is within the jurisdiction limits of this Court, or Plaintiff need not demonstrate adherence to any jurisdictional amount requirement under 28 U.S.C. § 1331. Finally, venue in this Court is appropriate as to all Defendants.

GENERAL ALLEGATIONS

IV.

Plaintiff incorporates Paragraph I through III of this Complaint as if fully set forth herein.

V.

From 1957 through 1968, EPNG, and its wholly-owned subsidiary, Rare Metals Corporation of America, Inc. ("RMCA"), which was subsequently merged into EPNG and ceased to exist in 1962, operated open-pit, class one uranium mines in the Cameron/Tuba City area.

VI.

At all times relevant hereto, these uranium mines and their remains were operated and maintained properly, pursuant to all necessary licenses and permits, and in

conformance with requirements imposed by all appropriate regulatory authorities, including the Navajo Nation, the United States Atomic Energy Commission, the United States Nuclear Regulatory Commission, and the Arizona Atomic Energy Commission.

VII.

Throughout the time that EPNG and RMCA operated the uranium mines, they sold to the United States Atomic Energy Commission all of the uranium concentrate mined, produced, processed, and ultimately milled, as a result of uranium mining activities, pursuant to their operations licenses with the United States Atomic Energy Commission. Accordingly, all of EPNG's activities at the mine sites, and their surrounding areas, were performed pursuant to an exclusive contract with the United States government.

VIII.

On April 20, 1995, Defendants Neztsosie filed a Complaint against EPNG and its former defunct subsidiary, RMCA, in the Navajo Tribal Court, Tuba City District. (TC-CV-0052-95)

IX.

The Complaint filed by Defendants Neztsosie alleges that water collected in the Cameron mine pits, as a result of uranium mining activities, was consumed by Laura and Arlinda Neztsosie, and their livestock. Defendants Neztsosie further allege that the same water also was used for swimming, bathing, and washing clothes.

X.

The Neztsosie Defendants claimed that radioactive substances gradually were released into the water, the surrounding soil and the ambient air as a result of uranium mining activities. Further, the Neztsosie Defendants assert that, as a result of this alleged contamination, they have suffered radioactive and heavy metal poisoning throughout their lifetimes. The Neztsosies' Complaint states causes of action for negligence, strict liability based upon abnormally dangerous activities, outrageous conduct, misrepresentation, and fraud, all allegedly due to uranium mining activities. The Neztsosie Defendants seek compensatory and punitive damages against EPNG as a result of the described uranium mining activities.

XI.

For its Answer to the Neztsosies' Complaint in the Navajo Tribal Court, EPNG affirmatively alleges that the Navajo Tribal Court lacks subject matter jurisdiction to hear this case.

FIRST CAUSE OF ACTION
(Request for Declaratory Relief)

XII.

Plaintiff incorporates Paragraphs I through XI of this Complaint as if fully set forth herein.

XIII.

As there is a dispute regarding the substantial federal question of whether the Navajo Tribal Court has subject matter jurisdiction over the Neztsosies' personal injury

claims under the present circumstances, there is a justifiable controversy between these parties pursuant to 28 U.S.C. § 2201 *et seq.*

XIV.

Because the activities and resulting damages alleged in the Neztsosies' Complaint in the Navajo Tribal Court involved the mining, processing, milling and production of uranium pursuant to an exclusive contract with the United States government, as well as the comprehensive laws of the United States, there exist overriding federal interests in this matter such that the exercise of tribal jurisdiction over EPNG and the subject matter of the Neztsosies' Complaint would be inconsistent with these overriding federal interests.

WHEREFORE, Plaintiff EPNG prays this Court to enter judgment for declaratory relief in its favor as follows:

A. That the Navajo Tribal Court has no jurisdiction over EPNG or the subject matter of the Neztsosies' pending Complaint in the Navajo Tribal Court;

B. For Plaintiff's reasonable costs incurred herein; and

C. For such other and further relief as the Court may deem just and proper under the circumstances.

SECOND CAUSE OF ACTION
(Request for Injunctive Relief)

XV.

Plaintiff incorporates Paragraphs I through XIV of this Complaint as if fully set forth herein.

XVI.

Due to the content and nature of the Neztsosies' allegations currently pending against EPNG in the Navajo Tribal Court, EPNG has suffered, and continues to suffer, immediate and irreparable harm.

XVII.

As a result of EPNG's necessary efforts to defend itself against the Neztsosies' allegations in a tribal forum that has no jurisdiction to hear this matter, EPNG has suffered and continues to suffer immediate and irreparable harm.

XVIII.

The Neztsosie Defendants' past and continuing conduct in asserting the underlying personal injury claims against EPNG in the Navajo Tribal Court have caused extreme prejudice to EPNG, and is in direct violation of the rights of EPNG.

WHEREFORE, Plaintiff EPNG prays that this Court grant its request for injunctive relief as follows:

A. A preliminary injunction and permanent injunction barring the Neztsosie Defendants from maintaining their underlying personal injury Complaint against EPNG, and any of its subsidiaries, in the Navajo Tribal Court, inasmuch as the Navajo Tribal Court possesses no jurisdiction to hear that matter;

B. EPNG's reasonable costs incurred in pursuit of injunctive relief; and

C. For such other and further relief as the Court may deem just and proper under the circumstances.

RESPECTFULLY SUBMITTED this 5th day of January, 1996.

O'CONNOR, CAVANAUGH, ANDERSON, WESTOVER, KILLINGSWORTH & BERESHEARS

By: _____
Richard J. Woods
Troy B. Froderman
Eric A. Mark

Attorneys for Plaintiff

and

Jamye Boone Ward, Co-Counsel for Plaintiff

IN THE COURT OF THE NAVAJO NATION
DISTRICT OF TUBA CITY, ARIZONA

LAURA NEZTSOSIE and ARLINDA NEZTSOSIE,

Plaintiffs,

vs

RARE METALS CORPORATION and
EL PASO NATURAL GAS CORPORATION, and
all affiliates and assignees thereof,

Defendants.

VERIFIED COMPLAINT

COMES NOW PLAINTIFFS, ARLINDA NEZTSOSIE AND LAURA NEZTSOSIE, by and through their attorney, Cherie V. Daut, and file the following Complaint:

JURISDICTION AND VENUE

1. Jurisdiction of this matter lies in the Navajo Nation Court, Tuba City District, according to 7 N.T.C. 253(5), 7 Navajo Tribal Code section 133 (a,b,c,d,e), 7 Navajo Tribal Code section 254, 7 Navajo Tribal Code section 302, 7 Navajo Tribal Code section 6030610, 7 Navajo Tribal Code section 651, Title 7 Navajo Tribal Code Section 602(a)(1), all of which provide for original jurisdiction in the Tribal Courts of the Navajo Nation.

2. All Plaintiffs are Navajo Indians, all of Defendants acts and emission took place solely on the Navajo Nation Reservation. Venue in proper in Tuba City since all transactions and occurrences took place in the Cameron and Tuba City, Arizona areas, and is based on the current location and convenience of the Plaintiffs.

3. Defendants or their affiliates or assignees, owned and operated open pit uranium mines in the Cameron/Tuba City area (Cameron mines) from approximately 1950 to 1965. The Cameron mines were left open and uncovered by Defendants during the mining operations and upon the termination of Defendant's uranium mining activities the Cameron mines remained open and uncovered for many years.

4. Due to Defendants operation of the Cameron mines the resultant open mining pits served as large collecting areas for water which would have otherwise been scarce in the Cameron/Tuba City arid climate.

5. Plaintiffs utilized the water which collected in the Cameron mine pits, which were created by Defendants mining operations, for drinking, bathing, swimming, clothes laundering and stock watering, and as a result, Plaintiffs were exposed to vast quantities of radioactive and non-radioactive substances which were released into the Cameron mine water and surrounding areas.

6. Defendants operation of the Cameron mines also introduced and released otherwise unoxidated uranium into the water table from which plaintiffs utilized well water for drinking, bathing, swimming, clothes laundering and stock watering.

7. Defendants operation of the Cameron mines has caused Plaintiffs to suffer severe injuries and damages, including severe health effects, emotion distress, annoyance and discomfort, severe physical and mental impairment and disability and fear of death, and as a result Plaintiffs have incurred medical expenses, decreased earning capacity, pain, suffering, loss of enjoyment of life and other past, present and future economic and non-economic damages.

FIRST CLAIM FOR RELIEF - NEGLIGENCE

8. Plaintiffs repeat the allegation which are contained in paragraphs 1 through 7 and incorporate them by reference herein:

9. Plaintiffs Laura Neztsosie and Arlinda Neztsosie have at all times lived in the Cameron Mines area. At all times relevant hereto, Defendants operated the Cameron Mines, where Defendants mined, accumulated, handled uranium ore.

10. Defendants knew or should have known that the hazardous materials which were generated from the mining of uranium ore constituted a grave risk to the health of persons who might have come in contact with it, including the Plaintiffs, and that care and caution should have been exercised in the handling of such materials.

11. As a direct and proximate result of the Defendants' failure to properly, safely and adequately contain and handle uranium ore and uranium mining waste, the mining waste has migrated off-site where it has entered the ground and surface water which is, and has been, utilized by the Plaintiffs.

12. Uranium and uranium mining waste continues to leave the Cameron mine sites which were created by Defendants and are a continuing and ongoing source of contamination to water, land and air, as well as to animals (sheep and cattle) which are owned and consumed by Plaintiffs.

13. Defendants owed a duty to Plaintiffs to use reasonable care in the handling and disposal of the hazardous radioactive and toxic materials which were produced as a result of their creation and operation of the Cameron uranium mines.

14. Defendants negligently caused or permitted radioactive and toxic emission to be released from the Cameron uranium mines. These emissions were regularly carried by ground water and soil and contaminated the properties and air where Plaintiffs resided.

15. Defendants also negligently failed to warn Plaintiffs of the potential for leakage and actual leakage of the hazardous radioactive and toxic materials into the air, ground water and soil in the vicinities of the Cameron uranium mines.

16. As a direct and proximate result of Defendants' breach of duty, Plaintiffs sustained severe injuries and losses, including but not limited to emotion distress and fear, severe physical injury, loss of enjoyment of life, and economic and non-economic losses.

17. Defendants breached their duty to Plaintiffs by failing to properly control and contain the radioactive and/or hazardous materials which were produced by Defendants mining activities at the Cameron mines, by negligently releasing the radioactive and/or hazardous materials into the air and allowing radioactive materials to

migrate or leach into the ground water, surface water, rivers and soil in the vicinity.

18. These releases and contamination of the air, ground water, surface water, rivers and soil in the vicinity of the Cameron mines were proximately caused by Defendants and the results were aggravated by the negligent acts and/or emissions of the Defendants including, but not limited to, the following:

(A) permitting the emissions, releases and leaks of radioactive and/or hazardous materials from the Cameron mines to occur;

(B) failing to determine where and how the emissions, releases and leaks of radioactive and/or hazardous materials occurred and in failing to correct the problems to prevent further leakage and emissions:

(C) failing to provide adequate containment of the radioactive and/or hazardous material;

(D) failing to provide adequate air, surface water, ground water, rivers and soil sampling and/or monitoring to detect releases of radioactive and/or hazardous materials;

(E) failing to take proper measurements of particle sizes and emissions;

(F) failing to test uranium ores adequately for the presence of hazardous or toxic materials;

(G) failing to timely and adequately warn or otherwise notify Plaintiffs of such contamination and to prevent recurring releases:

(H) failing to take timely and adequate remedial actions to contain and clean-up such contamination and to prevent recurring releases;

(I) failing to properly train and supervise Defendants employees to insure that the necessary safeguards and procedures would be followed in the event that any emissions, releases or leaks of radioactive and/or hazardous materials from the Cameron mines and properties might occur:

(J) failing to comply with applicable Navajo Tribal laws;

(K) completely failing to construct and implement remedial measures for containing radioactive and heavy metal releases from the open pit mines and uranium tailing areas of the Cameron mines. As a direct and proximate result of Defendant's conduct, Plaintiffs sustained severe injuries and damages.

SECOND CLAIM FOR RELIEF
ABNORMALLY DANGEROUS ACTIVITY - STRICT LIABILITY

19. Plaintiffs repeat the allegations which are contained in Paragraphs 1 through 18 and incorporate them by reference herein.

20. Defendants operated the Cameron mines in a manner that created emissions containing high concentrations of radioactive materials and toxic metals including but not limited to the following: uranium, copper, manganese, magnesium, molybdenum, sodium, chloride, sulfate, fluoride, silica, barium, beryllium, cadmium, chromium, cobalt, iron, lead, nickel, silver, strontium, vanadium, zinc, aluminum,

lithium, radium 226, uranium 238, uranium 234, uranium 235, radon 228, radon222, selenium, plutonium, lanthandies including cerium, luropium, lanthium, gallium, thorium, arsenic, mercury, and nitrates, as well as alpha, beta and gamma radiation, and other radioactive and toxic chemicals and particularities which is, as such, as a non-natural use of land and as such, constitutes an abnormally dangerous activity which created risks to Plaintiffs and others.

21. Defendant's open pit mining of radioactive and non radioactive hazardous substances as indicated in Paragraph 20 supra is an abnormally dangers activity or ultra hazardous activity, i.e., one which necessarily involves a risk of serious harm to the person, land or chattels of others which cannot be eliminated by the exercise of the utmost care and is not a matter of common usage.

22. Defendants area strictly liable to Plaintiff for all damages and injuries which have resulted and will result from the open pit mining of radioactive and non-radioactive hazardous substances as indicated in Paragraph 20 supra at the Cameron uranium mines.

23. Defendants' open pit mining of radioactive and non radioactive materials at the Cameron uranium mines have directly and proximately caused releases of such substances into the environment surround the Cameron uranium mines. As a direct and proximate result of Defendant's operation of the Cameron uranium mines in the aforesaid manner, Plaintiffs suffered the aforementioned injuries and damages to themselves for which Defendants are strictly liable.

THIRD CLAIM FOR RELIEF
OUTRAGEOUS CONDUCT

24. Plaintiffs repeat the allegations which are contained in Paragraphs 1 through 23 and incorporate them by reference herein.

25. The actions and inactions of Defendants complained of herein are so outrageous in character and so extreme in degree as to compel a reasonable person in the Navajo community to declare the same as atrocious, beyond all bounds of decency, and utterly intolerable in a civilized Navajo community.

26. As a direct and proximate result of the above conduct, Plaintiffs have suffered severe emotional distress and have injured and damaged as alleged herein.

FOURTH CLAIM FOR RELIEF:
MISREPRESENTATION/FRAUD AND DECEIT

27. Plaintiffs repeat the allegation which are contained in Paragraphs 1 through 26 and incorporate them by reference.

28. Defendants failed, both negligent and intentionally, to disclose to Plaintiffs, material facts which were known concerning the nature, magnitude and effects of the releases of the exposure to radioactive and other hazardous substances which were produced by Defendant's open pit mining operations at the Cameron mines.

29. Defendants knew of and concealed, misrepresented and failed to disclose the true facts which the intention of creating a false impression of the actual facts in the minds of Plaintiffs, and with the intent that Plaintiffs be

lulled into complacency and refrain from seeking redress or pursuing remedial action due to the development of Plaintiffs' severe physical injuries.

30. Plaintiffs reasonably believe Defendants' misrepresentation and relied upon the same in refraining until the present from seeking redress of pursuing remedial action. As a direct result of Defendants' negligent and/or intentionally false and deceptive representations and Plaintiff's reasonable relief of and reliance thereon, many of the injuries and damages to Plaintiffs arising out of the releases of hazardous substances into the environment were compounded by the passage of time and direct, daily exposure of Plaintiffs to same.

31. As a direct and proximate result of the above conduct, Plaintiffs have been injured and damaged as alleged herein.

FIFTH CLAIM FOR RELIEF:
EXEMPLARY DAMAGES AGAINST ALL DEFENDANTS

32. Plaintiffs repeat the allegations which are in Paragraph 1 through 31 above and incorporates them by reference herein.

33. The actions of Defendants complained of herein were attended by circumstances of fraud, malice, and insult, and the wanton and reckless disregard for Plaintiffs health and well being to and award of exemplary damages.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs prays that judgment be entered in their favor and against Defendants for

compensatory damages, consequential damages, special damages and exemplary damages, reasonable costs and expenses associated with this litigation, including attorney's fees and such other and further relief as this Court deems just and proper.

Cherie V. Daut,
Attorney for Plaintiffs'
Laura Neztsosie and
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[April 20, 1995]

UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

CYPRUS FOOTE MINERAL COMPANY,
a Pennsylvania corporation;
CYPRUS AMAX MINERALS COMPANY,
a Delaware corporation,

Plaintiffs,

vs.

ZONNIE MARIE DANDY RICHARDS,
individually and as representative of the
Estate of Harold J. Richards, Sr.,

Defendants.

No. 96-1524-PHX-RGS

COMPLAINT

I. GENERAL DESCRIPTION OF THE ACTION

1. This is an action by which plaintiffs Cyprus Foote Mineral Company and Cyprus Amax Minerals Company (collectively, "Cyprus") seek declaratory and injunctive relief to bar the prosecution of a lawsuit entitled *Zonnie Marie Dandy Richards (The Estates of Harold J. Richards, Sr., Deceased) v. Texas Zinc, Vanadium Corporation of America, Atlas Corporation, and all affiliates, joint venturers and assignees thereof*, pending in the District Court of the Navajo Nation, Kayenta District, ("Navajo Tribal Court"), No. KY-CV-002-95 (the "Tribal Court Suit"). The Tribal Court Suit

is "patently violative of express jurisdictional prohibitions" established by the Price Anderson Act, as amended, 42 U.S.C. § 2210 *et seq.*, and the exclusive federal control of the entire field of nuclear safety.

II. THE PARTIES

2. Cyprus Foote Mineral Company is a corporation organized and existing under the laws of the State of Pennsylvania with its principal place of business in Kings Mountain, North Carolina. Cyprus Amax Minerals Company is a corporation organized and existing under the laws of the State of Delaware with its principal place of business in Denver, Colorado. Cyprus Amax Minerals Company is the parent of Cyprus Foote Mineral Company. Cyprus is the successor by merger of Vanadium Corporation of America ("VCA") and Foote Mineral Company ("Foote"). Under AEC Source Material License No. SUA-547, VCA operated the Monument No. 2 uranium mine and concentrator from approximately 1943 through 1967. In 1967, VCA was merged with Foote. The Monument No. 2 facility was closed during or shortly before 1969.

3. Defendant Zonnie Marie Dandy Richards, individually and as representative of the Estate of Harold J. Richards, Sr. ("Richards"), is a member of the Navajo Nation and upon information and belief resides on that portion of the Navajo Nation within the borders of the State of Arizona. On or about March 29, 1995, Richards filed the Tribal Court Suit against "Texas Zinc, Vanadium Corporation of America, Atlas Corporation, and all affiliates, joint venturers and assignees thereof." On information and belief, the Cyprus defendants, as successor to VCA, are the only defendants to have been served with process in the Tribal Court Suit. On January 29, 1996, Richards filed a First Amended Verified Complaint in

the Tribal Court Suit, a copy of which is attached as Exhibit A.

III. JURISDICTION AND VENUE

4. This Court has jurisdiction of this action under 28 U.S.C. § 1331 in that this is an action arising under the Constitution, laws or treaties of the United States, particularly Art. I, § 8 and Art. VI, clause 2 of the Constitution of the United States. Jurisdiction is also conferred by 42 U.S.C. § 2210(n)(2) of the 1988 Amendments; 28 U.S.C. § 1332 (diversity of citizenship, and the amount in controversy exceeds $50,000, exclusive of interest and costs), and 28 U.S.C. § 1337 (Acts of Congress regulating commerce).

5. Venue is proper in this District pursuant to 28 U.S.C. § 1391(b) in that defendants reside in this District and a substantial part of the events or omissions giving rise to the plaintiffs' claims occurred in this District. Venue is also conferred by 42 U.S.C. § 2210(n)(2) in that defendants' Tribal Court Suit claims for "public liability" arising out of a "nuclear incident" occurred in this District.

IV. FACTUAL BACKGROUND

6. During World War II, the Manhattan Engineering District ("MED"), under the Army Corps of Engineers, was charged with the development of nuclear weapons. By August 1, 1946, when the first Atomic Energy Act was signed into law, the MED had over 5000 military and civilian employees and was administering contracts involving a total work force employing more than 50,000 people. The MED's activities included research and development, engineering and design, the operation of production facilities for weapons materials and components, and the acquisition of

uranium, the basic raw material essential to the production of nuclear weapons. All of the MED functions were transferred to the AEC by Executive Order No. 9816, effective December 31, 1946. The AEC was established by the Atomic Energy Act of 1946 (Pub.L. No. 79-585, 60 Stat. 755).

7. At the end of World War II, uranium production in the United States was practically nonexistent and the nation was dependent on small and unreliable foreign supplies of uranium. Responding to urgent military requirements, the AEC in 1947 instituted the Domestic Uranium Procurement Program ("the Procurement Program"). The Procurement Program was designed to create a domestic mining and milling industry to provide uranium concentrate for the government's vital nuclear weapons program. The Procurement Program was designed to fulfill the "paramount objective of assuring the common defense and security" set forth in the Atomic Energy Act of 1946. The Director of the Procurement Program has stated that "[n]o single material ever has been so essential to our safety, or even to our survival, as uranium."

8. Both the Atomic Energy Acts of 1946 and 1954 (42 U.S.C. § 2210 *et. seq.*) provided that the federal government would be the sole owner of uranium products. Moreover, at all times material hereto, the AEC exercised and maintained complete control over the uranium mining and milling industry through regulation, licensing, contractual requirements, construction requirements and administrative and safety control measures. *See e.g.* 10 CFR parts 20 and 40. The control of the federal government over the entire field of nuclear materials has been described as "unique," "absolute" and "exclusive."

9. In order to obtain supplies of uranium concentrate for the nuclear weapons program and to assure the

development of a domestic uranium industry, the AEC entered into contracts with several different companies, including VCA, calling for the construction and operation of uranium mills. These AEC contracts typically contained terms specifying where and when the uranium mills would be built, how they would be built, what their capacities would be, how much ore would be processed quarterly, how the uranium concentrate would be verified, sampled, assayed and packaged, from whom and where the company could purchase ore, and for how much the concentrate would be sold to the AEC.

10. Under AEC Source Material License No. SUA-547, VCA mined uranium at the Monument No. 2 mine, located in Cane Valley, Arizona. On information and belief, prospecting began at that site in approximately 1943. During the mid-1960's, the grade of uranium ore extracted from the Monument No. 2 mine became lower. Thus, pursuant to AEC specifications and instructions, VCA constructed the Monument No. 2 concentrator, which concentrated the uranium ore before shipping for further milling at VCA's Naturita and Durango, Colorado mills, and after 1963, at VCA's mill in Shiprock, New Mexico. The remnants of the ore concentrating process consisted of sand-like particles known as uranium tailings. These tailings were stored on a tailings pile on land adjacent to the concentrator and mine. In 1954, Congress made a finding that "byproduct material" is to be regulated "in the national interest." 42 U.S.C. § 2012(d). Uranium tailings are "byproduct material." 42 U.S.C. § 2014(e).

(2) The Price-Anderson Act and the 1988 Amendments

11. In 1957, Congress passed the Price-Anderson Act to address liability and compensation for damages and

injury which might be occasioned by the atomic energy program.

12. As amended in 1988, the Price-Anderson Act provides for federal jurisdiction over "public liability action[s]." The term "public liability action" means "any suit asserting public liability." 42 U.S.C. § 2014(hh). "Public liability" means "any legal liability arising out of or resulting from a nuclear incident or precautionary evacuation." 42 U.S.C. § 2014(w). "Nuclear incident" means "any occurrence, including an extraordinary nuclear occurrence, within the United States causing bodily injury, sickness, disease or death, or loss of or damage to property, or loss of or use of property, arising of or resulting from the radioactive, toxic, explosive or other hazardous properties of source, special nuclear or byproduct material." Id. § 2014(q). "Source material" includes the uranium ore mined at the Monument No. 2 mine. "Byproduct material" includes uranium mill tailings. 42 U.S.C. § 2014(e)(2).

13. A "nuclear incident" may be sudden and accidental or occur over a long period of time. S.Rep. No. 296, 85th Cong., 1st Session 16, reprinted in 1957 U.S. Code Cong. & Admin. News 1803, 1817.

14. The Price-Anderson Act, as amended, establishes a federal cause of action for radiation injuries, establishes federal jurisdiction over that cause of action and channels all legal liability to the federal courts for that cause of action.

15. A claim growing out of any nuclear incident is compensable under the terms of the Price-Anderson Act or it is not compensable at all.

16. Congress has completely occupied the field of nuclear safety. Except to the extent specifically permitted by Congress, neither States nor Indian Tribes, including their courts, may assert authority or jurisdiction over any matter touching this area. Congress has ceded no authority or jurisdiction to Indian tribal courts to adjudicate "public liability" actions.

(3) The Tribal Court Suit

17. As set forth in paragraph 3 above, Richards filed suit against VCA and others on March 29, 1995 in Navajo Tribal Court. On August 3, 1995, the Navajo Tribal Court ordered the Foote Mineral Company, Cyprus Foote Mineral Company and Cyrus Amax Mineral Company be joined as defendants in the Tribal Court Suit. At the time the Tribal Court Suit was filed, Cyprus was not transacting any business within the Navajo Nation. No process was ever personally served in the Tribal Court Suit upon Cyprus within the territorial jurisdiction of the Navajo Nation.

18. Cyprus filed a Motion for More Definite Statement on September 19, 1995. By order dated January 3, 1995, the Navajo Tribal Court granted that motion. Thus, Richards filed a First Amended Verified Complaint ("Tribal Court Complaint") on January 29, 1995. Exhibit A. Cyprus moved to dismiss the Tribal Court Suit for lack of subject matter jurisdiction on February 29, 1996. By order dated April 30, 1996, the Navajo Tribal Court denied that motion. Exhibit B.

19. In the Tribal Court Complaint, Richards alleges that Mr. Richards lived near the Monument No. 2 mine and concentrator as a child, between approximately 1950 through 1959. Richards also alleges that Mr. and Mrs. Richards lived near a uranium mill in Mexican Hat, Utah

from approximately 1959 through 1965. Cyprus and its predecessors had no interest whatsoever in the Mexican Hat uranium mill.

20. Richards generally alleges that "[a]s a result of Defendants' conduct of milling and mining uranium ore . . . vast quantities of both radioactive and non-radioactive hazardous substances released into the environment . . . and have caused and will cause Harold Richards, Sr. (deceased) and Plaintiff Zonnie Richards to suffer injuries and damages, including adverse health effects, terminal primary renal cell carcinoma, emotional distress, and annoyance and discomfort . . . ."

21. The Tribal Court Complaint contains seven counts, including claims for wrongful death and loss of consortium, based on theories of negligence, strict liability and fraud. Each count seeks damages "in excess of ONE HUNDRED THOUSAND ($100,000) DOLLARS and further amounts that would fairly and accurately compensate [Mrs. Richards] for her damages."

22. The Tribal Court Suit seeks to impose "public liability" on Cyprus in an action arising out of a "nuclear incident".

23. The assertion of Tribal Court jurisdiction over Cyprus in the Tribal Court Suit concerning the transaction and occurrences set forth in the Complaint therein constitute patent violations of express jurisdictional prohibitions established by the Price-Anderson Act, as amended, and the exclusivity of federal law concerning nuclear safety.

(4) El Paso Natural Gas Co. v. Neztsosie

24. Cyprus requests that the court take judicial notice of the proceedings in *El Paso Natural Gas Co. v. Laura Neztsosie and Arlinda Neztsosie*, CIV 96-0049-PCT-RGS. In that action, the Neztsosies filed suit against El Paso Natural Gas Co. ("EPNG") in Navajo Tribal Court, alleging that they had suffered injuries resulting from EPNG's operations of an open pit uranium mine near Tuba City, Arizona. EPNG filed an action in this district seeking declaratory and injunctive relief on the ground that the Neztsosie's Tribal Court Suit was barred by express jurisdiction prohibitions in the Price-Anderson Act, as amended.

25. A hearing was held on May 28, 1996 on EPNG's application for preliminary injunction before the Honorable Roger G. Strand. Although no formal ruling has been issued to date, Judge Strand indicated from the bench that he would enjoin the Neztsosies from pursuing claims for relief in Navajo Tribal Court that constituted claims under the Price Anderson Act.

COUNT ONE: DECLARATORY JUDGMENT

26. Plaintiffs incorporated by reference all the allegations of Paragraphs 1 through 23 of this Complaint.

27. Plaintiffs are "interested parties" within the meaning of 28 U.S.C. § 2201. They seek a declaration of their rights and legal relations concerning whether they are obligated to appear in and defend themselves in the Tribal Court Suit.

28. Specifically, pursuant to 28 U.S.C. § 2201, *et seq.*, plaintiffs requests declaratory judgment against defendants that:

a. That the Navajo Tribal Court is without subject matter jurisdiction to hear and adjudicate any claims against plaintiffs of the sort alleged in the Tribal Court Suit.

b. That any "judgment," "order" or "decree" or the like which the defendants may procure from the Navajo Tribal Court with respect to any such pending or threatened suit against plaintiffs by defendants in null, void and of no force and effect.

c. That the efforts and threatened efforts of the defendants to pursue claims of the sort currently alleged in the Tribal Court Suit are and wold be violative of plaintiffs' rights, privileges and immunities guaranteed plaintiffs under the Constitution, Treaties, and laws of the United States and of the State of Arizona.

COUNT TWO: INJUNCTION

29. Plaintiffs incorporate by reference the allegations of Paragraphs 1 through 26 of this Complaint.

30. Unless preliminary and permanently enjoined, Richards will proceed with their present and threatened actions seeking to require Cyprus to defend actions in the Navajo Tribal Court, which actions purport to impose "public liability" for a "nuclear incident" upon Cyprus, all without jurisdiction over the subject matter of such suits.

31. Other than by this suit, Cyprus lacks an adequate remedy at law and Richards' actions and threatened actions will cause Cyprus irreparable harm and injury.

WHEREFORE, plaintiffs, independently and in furtherance of their requested declaratory judgment, pray that this Court issue a temporary restraining order, preliminary

injunction and permanent injunction enjoining defendants and their agents from prosecuting or pursuing the Tribal Court Suit or commencing any similar claims or proceedings against plaintiffs or their property in the Navajo Tribal Court or otherwise than in this Court or in some Court of the State of Arizona having jurisdiction over the subject matter.

Plaintiffs further request an aware of their costs incurred in this matter, together with such other and further relief, equitable and legal, to which they may be entitled.

DATED this 25th day of June, 1996.

LEWIS AND ROCA LLP

By _____
Tom Galbraith
R. Neil Taylor III
Attorneys for Plaintiffs

EXHIBIT A

IN THE DISTRICT COURT OF THE NAVAJO NATION
KAYENTA DISTRICT COURT

ZONNIE MARIE DANDY RICHARDS
the estate of Harold J. Richards, Sr.
(deceased)

Plaintiff,

vs.

TEXAS ZINC, VANADIUM CORPORATION OF AMERICA, ATLAS CORPORATION, and all affiliates joint venturers and assignees thereof,

Defendants.

KY-CV-002-95

FIRST AMENDED VERIFIED COMPLAINT

COMES NOW ZONNIE MARIE DANDY RICHARDS, and files the following VERIFIED COMPLAINT:

JURISDICTION AND VENUE

1. Jurisdiction of this matter lies in the Navajo Nation Court, Kaventa District, according to 7 N.T.C. 253 (5), 7 Navajo Tribal Code Section 133 (a,b,c,d,e). 7 Navajo Tribal Code Section 254, 7 Navajo Tribal Code Section 302, 7 Navajo Tribal Code Section 602-610, 7 Navajo Tribal Code Section 651, Title 7 Navajo Tribal Code Section 602 (a) (1),

all of which provide for original jurisdiction in the Tribal Courts of the Navajo Nation.

2. The Plaintiff is a Navajo Indian and, all of the Defendants' acts and omissions took place solely on the Navajo National Reservation. Venue is proper in Kayenta based on the place or places where all transactions and occurrences took place and the sites of the original injury (Mexican Hat and Cane Valley) and is based on the current location and convenience of the Plaintiff.

3. Texas Zinc Corporation, Atlas Corporation, Vanadium Corporation of America, and their successors and assignees partners, joint ventures and/or subdivision thereof one another operated uranium mining and uranium milling facilities in Mexican Hat, Utah and Cane Valley, Arizona.

4. From approximately 1950-1963 at various periods of time Harold J. Richards, Sr. (deceased), husband of Plaintiff Zonnie Richards resided at Defendants' uranium milling facilities in Mexican Hat, Utah and as a child at the Cane Valley, VCA #2 Uranium mill and mine site, Arizona.

5. From 1950 to 1963, Plaintiff Harold J. Richards, Sr. (deceased), C#116.384 was exposed to vanadium and uranium and various radioactive substances and heavy metals through his residence at Defendants' Mexican Hat, Utah uranium mill and as a child, at the Cane Valley, VCA #2 uranium mill and mine sites, Arizona.

6. Defendants operated the Mexican Hat and Cane Valley uranium mine and mill, either as sole entities and/or as partners, joint ventures and/or subdivisions or assignees thereof of one another, from approximately 1950 to 1963. Defendants produced vanadium and uranium concentrate from raw ore which was mined from uranium mines through out the

Navajo Nation Reservation and from VCA #2 (Cane Valley mines) mine in Cane Valley where Harold Richards, Sr. (deceased) resided as a child.

7. From 1959 to 1965, Mr. Richards (deceased), resided in a small trailer located less than 50 yards away from the Mexican Hat mill tailings pile.

8. Mr. Richards (deceased) resided with his parents at the Vanadium Corporation of America (VCA #2 herein after) Uranium Mill site in Cane Valley from approximately 1953 to 1959 when he was still a child.

9. From approximately 1953 to 1959, Mr. Richards (deceased) resided with his parents at the VCA #2 site mill less than 50 yards away from the VCA #2 mill in a residential location which was provided by Defendants for VCA #2 mill and mine workers so that they could walk to work at the VCA #2 mill and mine.

10. During the time that Mr. Richards (deceased), as a child, resided less than 50 yards away from the VCA #2 mill site, no showers, bathing facilities or running water for daily bathing or washing of clothes was available.

11. As a result of Defendants' conduct of milling and mining uranium ore at Cane Valley and milling uranium ore at Mexican Hat, Utah vast quantities of both radioactive and non-radioactive hazardous substances released into the environment at both the Cane Valley, VCA #2 mill site and Mexican Hat mill site, and have caused and will cause Harold Richards, Sr. (deceased) and Plaintiff Zonnie Richards to suffer injuries and damages, including adverse health effects, terminal primary renal cell carcinoma, emotional distress, and annoyance and discomfort, physical and mental impairment and disability, and fear of personal injury and death as well as

loss of care, comfort and consortium and as a result, the Plaintiff Zonnie Marie Dandy Richards has incurred medical expenses and decreased earning capacity, pain and suffering, loss of enjoyment of life, and other past, present and future economic and non-economic damages.

FIRST CLAIM FOR RELIEF
WRONGFUL DEATH OF
HAROLD J. RICHARDS, SR., NEGLIGENCE

12. Plaintiff repeats the allegations contained in Paragraph 1 through 11 and incorporates them by reference herein.

13. Harold J. Richards, Sr. (deceased) was married to Plaintiff Zonnie Marie Dandy Richards when they resided together at the Mexican Hat mill site.

14. Harold J. Richards, Sr., (deceased), was born December 4, 1936. From approximately 1955 to 1963, he resided at either the Cane Valley, Arizona uranium mine and uranium mill, as a child, Mexican Hat uranium mill with his wife, Plaintiff, Zonnie Marie Dandy Richards. Harold Richards, Sr. (deceased) was exposed to vanadium, uranium and various radioactive substances and heavy metals through his residence at the Defendants' Cane Valley uranium mine and mill, as a child, and Mexican Hat uranium mill areas when he resided there with his wife, Plaintiff herein.

15. At the time of Harold Richard, Sr. (deceased) and Plaintiff Zonnie Marie Dandy Richards residence in Mexican Hat, Utah, they lived (50) yards away from Defendants Mexican Hat uranium mill in a small trailer together. Plaintiff Zonnie Marie Dandy Richards and Harold Richards, Sr. (deceased) were allowed to live in such close proximity to the Mexican Hat uranium mill by Defendants, herein, with

Defendants' full knowledge of this residence and its proximity to the Mexican Hat uranium mill. At all times pertinent hereto concerning the Mexican Hat uranium mill, Plaintiff Zonnie Marie Dandy Richards and Harold Richards, Sr. (deceased) were married and resided together as husband and wife.

16. As a result of Defendants' conduct, i.e., the milling of uranium and vanadium ores at Mexican Hat, Utah during Plaintiff's husband Harold Richard, Sr. (deceased) residence at the Mexican Hat mill, Plaintiff's husband Harold Richards, Sr. (deceased) clothes, furniture, housewares, home and food were contaminated with uranium ore dust, yellow cake and toxic chemical residue which came from Defendant's uranium mill at Mexican Hat, Utah. These items were then handled, laundered together, eaten, worn, sat upon and lived in or otherwise came in contact with Mr. Richards (deceased) and Plaintiff. Due to Defendants uranium milling activities in Mexican Hat, Utah, excessive and deleterious quantities of both radioactive and non-radioactive hazardous substances were released into close proximity of Plaintiff Zonnie Marie Dandy Richards and harold Richards, Sr. Mexican Hat residence. Additionally due to Defendants uranium mining and milling activities at Cane Valley at Harold Richard's Cane Valley resided as a child.

Excessive and deleterious qualities of both radioactive and non-radioactive hazardous substances were released into close proximity of Harold Richard Sr. (deceased) residence. These substances have caused and/or will cause Plaintiff and her husband to suffer sickness and death due to cancer and emotional distress, annoyance and discomfort, physical and mental impairment and disability, and fear of personal injury and death. As a result of defendants release of these substances in both Mexican Hat and Cane Valley, Plaintiff Zonnie Marie Dandy Richards and her deceased husband

Harold Richards, Sr., have incurred and will incur in medical expenses including decreased earning capacity, pain and suffering, and death, loss of enjoyment of life, and other past, present and future economic and non-economic damages.

17. During the years the Defendants operated and were responsible for the Mexican Hat mill and Cane Valley uranium mine and mill, Defendants accumulated, handled, processed, treated, stored, burned, and otherwise disposed of large quantities of radioactive and/or hazardous materials at their property in Cane Valley, Arizona and Mexican Hat, Utah.

18. Defendants knew or should have known that these radioactive and/or hazardous materials and constituents posed a hazard to the health and emotional well-being of Plaintiff and her husband, Harold Richards, Sr. (deceased).

19. Defendants owed a duty to Plaintiff and to Harold Richard, Sr. (Deceased) to use reasonable care in the handling and disposal of the hazardous radioactive and toxic materials used or produced at the Mexican Hat uranium mill and Cane Valley uranium mine and mill.

20. Defendants negligently caused or permitted radioactive and toxic emissions to be released from the Mexican Hat uranium mill and Cane Valley uranium mill and mine. These emissions were regularly carried by ground water and soil and contaminated the properties and air where Plaintiff and Harold Richards, Sr. (deceased) resided.

21. Defendants also negligently failed to warn Plaintiff and Harold Richards Sr. (deceased) of the potential for leakage and actual leakage of the hazardous radioactive and toxic materials into the ground water soil and in air of Plaintiff and Harold Richards, Sr. (deceased) home or homes

and the vicinities of the uranium mill as well as Plaintiff and her husband's food, clothing and home environments.

22. As a direct and proximate result of Defendants' breach of duty, the Plaintiff and Harold Richards, Sr. (deceased) sustained injuries and losses, including but not limited to emotional distress and fear, physical injury, loss of enjoyment life, and other economic and non-economic losses as yet unknown.

23. Defendants breached their duty to Plaintiff and Harold Richards, Sr. (deceased) by failing to properly control and contain the radioactive and/or hazardous materials within the confines of the facility and property which they owned, by negligently releasing the radioactive and/or hazardous materials into the air and allowing radioactive materials to migrate or leach into the ground water, surface water, rivers and soil in the vicinity of the Mexican Hat mill site and Cane Valley mine and mill site where Harold Richards, Sr. (decreased) resided.

24. These releases and contaminations of the air, ground water, surface water, rivers and soil in the vicinity of the facilities of the Mexican Hat mill site and Cane Valley mill and mines sites as well as Plaintiff's husband's food, clothing and home environment were proximately caused by Defendants and the results were aggravated by the negligent acts and/or emissions of the defendants including, but not limited to, the following:

(A) permitting the emissions, releases and leaks of radioactive and/or hazardous materials from the facility and property to occur;

(B) failing to determine where and how the emissions, releases and leaks of radioactive and/or hazardous

materials occurred and in failing to correct the problems to prevent further leakage and emissions;

(C) failing to provide adequate containment of the radioactive and/or hazardous materials;

(D) failing to provide adequate air, surface water, ground water, rivers and soil sampling and/or monitoring to detect releases of radioactive and/or hazardous materials;

(E) failing to take proper measurements of particle sizes and emissions;

(F) failing to test incoming ores adequately for the presence of hazardous or toxic materials;

(G) failing to timely and adequately warn or otherwise notify Plaintiff and her husband, Harold Richards, Sr. (deceased) of such contamination and to prevent reoccurring releases;

(H) failing to take timely and adequate remedial actions to contain and clean up such contamination and to prevent reoccurring releases;

(I) failing to property train and supervise their employee to insure that the necessary safeguards and procedures would be followed in the event that any emissions, releases or leaks of radioactive and/or hazardous materials from the facility and property might occur;

(J) failing to comply with applicable Tribal laws;

(K) being negligent in the construction and implementation of remedial measures for containing releases from the tailing ponds and operating facilities;

(L) failing to prevent Harold Richards. Sr. (deceased) from coming in contact with touching or otherwise being exposed to uranium dust, yellow cake and/or toxic chemical residue on Plaintiff's husband Harold Richards, Sr. (deceased) food, clothing, body, and home environment.

25. As a direct and proximate result of Defendants' conduct, Harold Richard, Sr. (deceased) sustained injury and damage in that he contracted renal cell carcinoma.

26. As a direct and proximate result of Harold J. Richards, Sr.'s (deceased) exposure to the radioactive and non radioactive hazardous substances which were released by Defendants at the Mexican Hat mill and the Cane Valley uranium mine (VCA #2). Harold J. Richards, Sr. (deceased) developed and died as a result of renal cell carcinoma.

27. As a consequences of aforesaid injury, Harold Richards, Sr. died on January 5, 1993.

28. Left surviving was his wife, Zonnie Marie Dandy Richards.

29. As a result of the death of Harold Richards, Sr., Plaintiff Zonnie Marie Dandy Richards suffered the loss of society of her husband and other related economic and non-economic damages. expenses.

30. WHEREFORE, the Plaintiff Zonnie Marie Dandy Richards, pray's for Judgment against the Defendant's, in a sum in excess of ONE HUNDRED THOUSAND ($100,000.00) DOLLARS and such further amounts that would fairly and accurately compensate her for her aforesaid damages.

SECOND CLAIM FOR RELIEF
WRONGFUL DEATH OF HAROLD J. RICHARDS: ULTRA HAZARDOUS

31. Plaintiff repeats the allegations contained in Paragraph 1 through 30 and incorporates them by reference herein.

32. Defendants operated the Mexican Hat uranium mill and Cane Valley uranium mill and mine in a manner that created emissions containing high concentrations of radioactive materials and toxic metals including but not limited to the following: uranium, copper, manganese, magnesium, molybdenum, sodium, chloride, sulfate, fluoride, silica, barium, beryllium, cadmium, chromium, cobalt, iron, lead, nickel, silver, strontium, vanadium zinc, aluminum, lithium, radium 226, uranium 238, uranium 234, uranium 235, radon 228, radon 222, selenium, plutonium, lanthanum including curium, luropium, lanthium, gallium, thorium, asernic, mercury, and nitrates as well as alpha, beta and gamma radiation, and other radioactive and toxic chemicals and particularities which is, as such, as a non-natural use of land and as such, constitutes an abnormally dangerous activity which created risks to Plaintiffs and others.

33. The collection, handling and processing of radioactive and non-radioactive hazardous substances as indicated in Paragraph 32 supra is an abnormally dangerous activity or ultra hazardous activity, i.e., one which necessarily involves a risk of serious harm to the person, land or chattels of others which cannot be eliminated by the exercise of the utmost care and is not a matter of common usage.

34. Defendants are strictly liable to Plaintiff and Harold Richard, Sr. (deceased) for all damages and injuries which have resulted and will result from the collection and

processing of radioactive and non-radioactive hazardous substances as indicated in Paragraph 32 supra at the Mexican Hat uranium mill and Cane Valley uranium mine and mill facilities and properties.

35. Harold Richard Sr. (deceased) was born on December 4, 1936 and resided with his wife, Plaintiff Zonnie Marie Dandy Richards at Defendants Mexican Hat uranium mill site. Harold Richard Sr. (deceased) also resided as a child at the Defendant's Cane Valley Uranium mill and mine site.

36. Defendants' collection, handling and processing of radioactive and non-radioactive materials at the Mexican Hat uranium mill and Cane Valley uranium mill and mine facilities and properties have directly and proximately caused releases of such substances into the environment and community surrounding the Mexican Hat uranium mill and Cane Valley uranium mill and mine facilities and properties where Harold J. Richards, Sr. (deceased), either as a child (Cane Valley, VCA #2 as a child and Mexican Hat as an adult) or as husband to Plaintiff, resided.

37. As a direct and proximate result of Defendant's operation of the Mexican Hat uranium mill and the Cane Valley uranium mine and mill facilities in the aforesaid manner, Plaintiff suffered the aforementioned injuries and damages as alleged herein to herself for which Defendants are strictly liable.

38. As a direct and proximate result of Defendants' conduct, Harold Richards, Sr. (deceased) sustained injury and damage in that he contracted renal cell carcinoma.

39. As a consequence of the aforesaid injury, Harold Richards, Sr. died on January 5, 1993. Left surviving is his

wife, Zonnie Marie Dandy Richards, who has suffered a loss of society comfort and consortium and other related damages.

40. WHEREFORE, the Plaintiffs Zonnie Marie Dandy, prays for Judgment against the Defendant, in a sum in excess of ONE HUNDRED THOUSAND ($100,000.00) DOLLARS and such further amounts that would fairly and accurately compensate her for her aforesaid damages.

THIRD CLAIM FOR RELIEF
LOSS OF CONSORTIUM: NEGLIGENCE
HAROLD J. RICHARDS

41. Plaintiff repeats the allegations contained in Paragraphs 1 through 40 above, and incorporates them by reference herein.

42. Harold Richards, Sr. (deceased) was born on December 4, 1936. From approximately 1950 to 1963, Plaintiff Harold J. Richards, Sr. (deceased) was exposed to radioactive and non-radioactive toxic substances at the Mexican Hat uranium mill and Cane Valley uranium mine and mill facilities, where he resided, either as an adult or as a child.

43. Plaintiff Zonnie Marie Dandy Richards and her husband Harold J. Richards, Sr., (deceased) were exposed to vanadium, uranium and various radioactive substances and heavy metals through their residence at the Defendants Mexican Hat Uranium mill. Harold J. Richards, Sr. (deceased) was also exposed to vanadium, uranium radioactive and non-radioactive substances and heavy metals at the Defendant's Cane Valley uranium mine and mill facilities where he resided with his parents as a child.

44. From 1959 to 1965 Plaintiff Zonnie Marie Dandy Richards and her husband resided less than (50) feet from Defendants Mexican Hat uranium mill. Plaintiff Zonnie Marie Dandy Richards and Harold J. Richards, Sr. (deceased) were allowed to live in such close proximity to the Mexican Hat uranium mill by Defendants and with Defendants full knowledge of their residence in such close proximity to these facilities. At all times pertinent hereto concerning the Mexican Hat uranium mill, Plaintiff Zonnie Marie Dandy Richards and Harold J. Richards, Sr. (deceased) were married and resided together as husband and wife.

45. As a result of Defendants' conduct, i.e., the milling of uranium ore, and Mr. Harold J. Richard Sr. (deceased) residence at the Mexican Hat uranium mill and Cane Valley uranium mine and mill, as a child, Harold Richards, Sr. (deceased) came in contact with deleterious quantities of both radioactive and non-radioactive hazardous substances which were released by Defendants' operations at the Mexican Hat and Cane Valley uranium facilities.

46. During the years the Defendants operated and were responsible for the Mexican Hat mill and Cane Valley mine and mill Defendants accumulated, handled, processed, treated, stored, burned, and otherwise disposed of large quantities of radioactive and/or hazardous materials at their properties in Mexican Hat, Utah and Cane Valley, Arizona.

47. Defendants knew or should have known that these radioactive and/or hazardous materials and constituents posed a hazard to the health and emotional well-being of Plaintiff Harold Richards, Sr. (deceased).

48. Defendants owed a duty to Harold Richards, Sr. (deceased) and thereby to Plaintiff to use reasonable care in the handling and disposal of the hazardous radioactive and

toxic materials used or produced at the Mexican Hat uranium mill and Cane Valley mines.

49. Defendants negligently caused or permitted radioactive and toxic emissions to be released from the Mexican Hat uranium mill and Cane Valley uranium mine and mill. These emissions were regularly carried by ground water, soil and air and, therein contaminated the property or properties where Plaintiff and/or Harold Richards Sr. (deceased) resided.

50. Defendants also negligently failed to warn Plaintiff and Harold Richards, Sr. (deceased) of the potential for leakage and actual leakage of the hazardous radioactive and toxic materials into the ground water and soil of Plaintiff and/or Harold Richards, Sr. (deceased), residence of residences.

51. As a direct and proximate result of Defendants' breach of duty, Harold Richards, Sr. and Plaintiff sustained injuries and losses, including but not limited to emotional distress and fear, physical injury, loss of enjoyment of life, and other economic and non-economic losses as yet unknown.

52. Defendants breached their duty to Harold Richards, Sr. (deceased) and to Plaintiff by failing to properly control and contain the radioactive and/or hazardous materials within the confines of the facilities and properties which they owned, by negligently releasing the radioactive and/or hazardous materials into the air and allowing radioactive materials to migrate or leach into the ground water, surface water, rivers and soil in the vicinity of the Mexican Hat mill and Cane Valley mine and mill sites.

53. These releases and contaminations of the air, ground water, surface water, rivers and soil in the vicinity of the

facilities of the Mexican Hat uranium mill and Cane Valley uranium mine and mill sites were proximately caused by Defendants and the results were aggravated by the negligent acts and/or emissions of the Defendants including, but not limited to, the following:

(A) permitting the emissions, releases and leaks of radioactive and/or hazardous materials from the facility and property to occur;

(B) failing to determine where and how the emissions, releases and leaks of radioactive and/or hazardous materials occurred and in failing to correct the problems to prevent further leakage and emissions;

(C) failing to provide adequate containment of the radioactive and/or hazardous materials;

(D) failing to provide adequate air, surface water, ground water, rivers and soil sampling and/or monitoring to detect releases of radioactive and/or hazardous materials;

(E) failing to take proper measurements of particle sizes and emissions;

(F) failing to test incoming ores adequately for the presence of hazardous or toxic materials;

(G) failing to timely and adequately warn or otherwise notify Plaintiffs of such contamination and to prevent reoccurring releases;

(H) failing to take timely and adequate remedial actions to contain and clean up such contamination and to prevent reoccurring releases;

(I) failing to properly train and supervise their employees to insure that the necessary safeguards and procedures would be followed in the even that any emissions, releases or leaks of radioactive and/or hazardous materials from the facilities and properties might occur;

(J) failing to comply with applicable Tribal laws;

(K) being negligent in the construction and implementation of remedial measures for containing releases from the tailing ponds and operating facilities.

(L) failing to prevent Harold J. Richards, Sr. from coming in contact with, touching, or otherwise being exposed to uranium dust, yellow cake and/or toxic chemical residue on Plaintiff Zonnie Marie Dandy Richards's husband's food, clothing and body and home environment.

54. As a direct and proximate result of Plaintiff's conduct, Harold J. Richards, Sr. sustained injury and damage in that he contracted renal cell carcinoma.

55. As a consequence of the aforesaid injury, Harold J. Richards, Sr. died on January 5, 1993.

56. Left surviving was his wife Zonnie Marie Dandy Richards.

57. As a result of the death of Harold J. Richards, Sr., Plaintiff Zonnie Marie Dandy Richards has suffered and will continue to suffer a loss of consortium.

58. WHEREFORE, Plaintiff Zonnie Marie Dandy Richards, prays for Judgment against the Defendants, in a sum in excess of ONE HUNDRED THOUSAND ($100,000.00)

DOLLARS and such further amounts that would fairly and accurately compensate her for her aforesaid damages.

FOURTH CLAIM FOR RELIEF
LOSS OF CONSORTIUM:
ULTRA HAZARDOUS ACTIVITY

59. Plaintiffs repeat the allegations contained in Paragraph 1 through 58 and incorporate them by reference herein.

60. Plaintiff Harold J. Richards, Sr. (deceased) was the lawful spouse of Plaintiff Zonnie Marie Dandy Richards at times relevant to the Defendant's Mexican Hat mill operations.

61. Defendants operated the Mexican Hat uranium mill and Cane Valley uranium mill and uranium mine in a manner that created emissions containing high concentrations of radioactive materials and toxic metals including but not limited to the following: uranium, copper, manganese, magnesium, molybdenum, sodium, chloride, sulfate, fluoride, silica, barium, beryllium, cadmium, chromium, cobalt, iron, lead, nickel, silver, strontium, vanadium zinc, aluminum, lithium, radium 226, uranium 238, uranium 234, uranium 235, radon 228, radon 222, selenium, plutonium, lanthanum including curium, luropium, lanthium, gallium, thorium, asernic, mercury, and nitrates as well as alpha, beta and gamma radiation, and other radioactive and toxic chemicals and particulate which is, as such, was a non-natural use of land and as such, constitutes an abnormally dangerous activity which created risks to Plaintiffs and others.

62. The collection, handling and processing of radioactive and non-radioactive hazardous substances as indicated in Paragraph 61-supra is an abnormally dangerous

activity or ultra hazardous activity, i.e., one which necessarily involves a risk of serious harm to the person, land or chattels of others which cannot be eliminated by the exercise of the utmost care and is not a matter of common usage.

63. Defendants are strictly liable to Plaintiff for all damages and injuries which have resulted and will result from the collection and processing of radioactive and non-radioactive hazardous substances as indicated in Paragraph 61-supra at the Mexican Hat uranium mill and Cane Valley uranium mill and mine facility and property.

64. Defendants' collection, handling and processing of radioactive and non-radioactive materials at the Mexican Hat uranium mill and Cane Valley uranium mill and mines have directly and proximately caused releases of such substances into the environment and communities surrounding the Mexican Hat uranium mill and Cane Valley uranium mill and mine facilities and properties.

65. Harold J. Richards, Sr. (deceased) was born on December 4, 1936, and at times relevant to the Mexican Hat uranium mill resided with his wife Plaintiff Zonnie Marie Dandy Richards.

66. As a direct and proximate result of Defendants' operation of the Mexican Hat uranium mill and Cane Valley uranium mine and mill facilities in the aforesaid manner, Harold J. Richards Sr. (deceased) suffered the aforementioned injuries and damages as alleged herein, for which Defendants are strictly liable.

67. As a direct and proximate result of Defendant's conduct, Harold J. Richards, Sr. (deceased) sustained injury and damage in that he contracted renal cell carcinoma.

68. As a consequence of the aforesaid injury, Harold J. Richards, Sr. died on January 5, 1993. Left surviving was his wife, Plaintiff Zonnie Marie Dandy Richards.

69. As a result of the death of Harold J. Richards, Sr. his wife has suffered and will suffer loss of consortium.

70. WHEREFORE, the Plaintiffs Zonnie Marie Dandy Richards prays for Judgment against the Defendant, in a sum in excess of One HUNDRED THOUSAND ($100,000.00) DOLLARS and such further amounts that would fairly and accurately compensate her for her aforesaid damages.

FIFTH CLAIM FOR RELIEF
OUTRAGEOUS CONDUCT

71. Plaintiff repeats the allegations contained in Paragraph 1 through 70 above, and incorporates them by reference herein.

72. The actions and inactions of Defendants complained of herein are so outrageous in character and so extreme in degree as to compel a reasonable person in the Navajo community to declare the same as atrocious, beyond all bounds of decency, and utterly intolerable in a civilized Navajo community.

73. As a direct and proximate result of the above conduct, Plaintiff has suffered severe emotional distress and has been injured and damaged as alleged herein.

74. WHEREFORE, the Plaintiff's Zonnie Marie Dandy Richards prays for Judgment against the Defendant, in sum in excess of ONE THOUSAND ($100,000.00) DOLLARS and such further amounts that would fairly and accurately compensate her for her aforesaid damages.

SIXTH CLAIM FOR RELIEF
MISREPRESENTATION/FRAUD AND DECEIT

75. Plaintiff repeats the allegations contained in Paragraph 1 through 74 above and incorporates them by reference herein.

76. Defendants failed, both negligently and intentionally, to disclose to Harold J. Richards, Sr. and to Plaintiff, material facts which were known to them concerning the nature, magnitude and effects of the release of and exposure to radioactive and other hazardous substances which were generated, handled, stored, treated or disposed of at the Mexican Hat uranium mill and the Cane Valley uranium mill and mine facilities and properties.

77. Defendants knew of and concealed, misrepresented and failed to disclose the true facts with the intention of creating a false impression of the actual facts in the minds of Harold Richards, Sr. and Plaintiff, and with the intent that Harold Richards, Sr. and Plaintiff be lulled into complacency and refrain from seeking redress or pursuing remedial action due to the development and death from renal cell cancer of Harold Richards, Sr. (deceased).

78. Plaintiff and Harold Richards, Sr. (deceased) reasonably believed Defendants' misrepresentations and relied upon the same in refraining until the resent from seeking redress or pursuing remedial action.

79. As a direct result of Defendants' negligent and/or intentionally false and deceptive representations and Plaintiff and Harold Richards, Sr. (deceased), reasonable relief of and reliance thereon, many of the injuries and damages to Plaintiff arising out of the releases of hazardous substances into the

environment were compounded by the passage of time and direct, daily exposure by Harold J. Richards, Sr. to same.

80. As a direct and prominent result of Defendants' conduct, Plaintiff has been injured and damaged as alleged herein.

WHEREFORE, the Plaintiff Zonnie Marie Dandy Richards pray's for Judgment against the defendant, in a sum in excess of ONE HUNDRED THOUSAND ($100,000.00) DOLLARS and such further amounts that would fairly and accurately compensate her for her aforesaid damages.

SEVENTH CLAIM FOR RULING
EXEMPLARY DAMAGES AGAINST ALL DEFENDANTS

81. Plaintiff repeats the allegations contained in Paragraph 1 through above 80 and incorporates them by reference herein.

82. The actions of Defendants complained of herein were attended by circumstances of fraud, malice, and insult, and the wholly wanton and reckless disregard of Harold Richards, Sr.'s and Plaintiff's lives and health by Defendants actions justifies to an additional award of exemplary damages.

WHEREFORE, the Plaintiffs Zonnie Marie Dandy Richards prays for Judgment against the Defendant, in a sum in excess of ONE HUNDRED THOUSAND ($100,000.00) DOLLARS and further amounts that would fairly and accurately compensate her for her aforesaid damages.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays that judgment be entered in their favor and against Defendants for compensatory damages, consequential damages, special damages and exemplary damages, reasonable costs and expenses associated with this litigation, including attorney's fees and such other and further relief as this Court deems just and proper.

/signed/ 1-29-96
Cherie V. Daut
Attorney at Law for
Zonnie Marie Dandy Richards
P.O. Box 1357
Shiprock, New Mexico 87420
(505) 368-5878

EXHIBIT B

IN THE DISTRICT OF THE NAVAJO NATION
JUDICIAL DISTRICT OF KAYENTA, ARIZONA

Zonnie Marie Dandy Richards
(The Estate of Harold J. Richards, Sr.
Deceased),

Plaintiff,

vs.

TEXAS ZINC, VANADIUM CORPORATION OF AMERICA, ATLAS CORPORATION, and all affiliates joint venturers and assignees thereof,

Defendants.

KY-CV-002-95

ORDER DENYING MOTION TO DISMISS

This matter came before the Court on the Defendant's Motion to Dismiss for Lack of Subject Matter Jurisdiction and Failure to State a Claim upon which this Court may grant relief. For the reasons below, the Motion to Dismiss is denied and the Court will proceed on the merits.

FACTS

Plaintiff Zonnie Marie Dandy Richards, on behalf of the Estate of Harold J. Richards, Sr., alleges that the decedent lived as a child near the defendants' mining and milling facility. Mr. and Mrs. Richards lived near another uranium milling facility in Mexican Hat, Utah. The plaintiffs claim that the defendants operated the Mexican Hat uranium

mill and VCA #2 uranium mine. They are located on Navajo trust land. Through his residence near one or more of these sites, Mr. Richards was exposed to radioactive materials from the processing of uranium that allegedly caused his death. As a result, Zonnie Richards filed a civil suit seeking damages for injuries. It is unclear to the Court whether she has filed suit in her capacity as representative of her deceased husband's estate or, individually, in her own right or both.

MOTION TO DISMISS

Defendants Vanadium Corporation of American and the successors-in-interest to VCA, Cyprus Foote Mineral Corporation and Foote Minerals Corporation assert that the Navajo Court has no jurisdiction under express provisions of federal law, the Price-Anderson Act. 42 USC ss2011 et esq.

This case presents the question of whether the Navajo Court has civil jurisdiction over the defendants. They claim that 1) Navajo Nation jurisdiction is pre-empted by the Price-Anderson Act and 2) the Court's exercise of jurisdiction would frustrate the removal provisions of the Act, which give the defendants an "absolute" right to remove the case to federal court. That question can be resolved by considering the impact of treaties, statutes and the inherent sovereignty of the Navajo Nation.

SUBJECT MATTER JURISDICTION

The Navajo Nation Code grants the District Courts original jurisdiction over all civil actions in which the defendant "...has caused an action to occur within the territorial jurisdiction of the Navajo Nation." 7 NTC ss253(2). The issue is whether the Navajo Nation has the power to assert civil jurisdiction over non-Indian defendants whose

allegedly tortious conduct occurred within the Navajo Nation, given the Price-Anderson Act.

Indian nations have been characterized as "quasi-sovereigns", Fisher v. District Court, 424 U.S. 382, 390, 96 S.Ct. 943, 948, 47 L.Ed.2d 106 (976) (per curiam:, and it has been noted that the sovereignty of tribes is different from that of states. See Native American Church v. Navajo Tribal Council, 272 F.2d 131 (10th cir. 1959); 1 NTC Chapter 1. White Mountain Apache Tribe v. Bracker, 448 U.S. 136 143, 100 S.Ct. 2578, 2583, 65 L.Ed.2d 665 (1980).

The United States Supreme Court has suggested the following analysis for ascertaining the limits of tribal sovereignty: Indian nations retain those powers of self-government not voluntarily relinquished by treaty, not divested by Congressional enactment, and not inconsistent with the overriding sovereign interests of the United States. Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 208-09, 98 S.Ct. 1011, 1020-21, 55 L.Ed.2d 209 (1978). See United States v. Wheeler, 435 U.S. 313, 98 S.Ct. 1079, 55 L.Ed.2d 303 (1978). Tribes may also exercise those powers which would otherwise be inconsistent with overriding federal interests if Congress has explicitly delegated such powers to them. Montana v. United States. _____ U.S.____, 101 S.Ct. 1245, 67 L.Ed. 2d 493 (1981).

This Court does not find anything in the 1850 or 1868 Navajo Treaties to support the proposition that the Navajo Tribe has explicitly relinquished civil jurisdiction over non-Indians. However, the defendants have presented the claim that the Price-Anderson Act precludes the Navajo Nation from hearing the claims raised. The applicable provision is 42 USC ss2210(n)(2) which confers original jurisdiction on the U.S. District Courts, without regard for diversity of citizenship or the amount in controversy, over any

public liability action "arising out of or resulting from a nuclear incident." ss2014(w). Whether or not this is a "nuclear incident" is a factual issue for trial.

With respect to the third prong of the analysis, the defendants argue that the exercise of tribal court jurisdiction over it would be inconsistent with overriding federal interests and thus is not among the retained powers of the tribe. The tribal court's power to adjudicate claims involving injuries from uranium operations located on the Navajo reservation is of the type the United States has a concern in protecting. The federal government has an interest in regulating the production of nuclear power and protecting the health and safety of the public. However, the exercise of civil jurisdiction by the Navajo court is consistent with the federal interests in resolving claims of injuries arising out of a nuclear incident. Assuming jurisdiction over this case is necessary to protect tribal self-government, to control internal relations and does not jeopardize the security and safety concerns which prompted the Price-Anderson Act.

In this case, the alleged actions took place within the territorial jurisdiction of the Navajo Nation. As the injuries occurred on the reservation, a tribal forum to redress such injuries is clearly related to tribal self-government or internal relations since the defendants' allegedly tortious conduct occurred on the reservation. Defendants are located on the reservation and the plaintiffs live on the reservation. Defendants are located on the reservation and the plaintiffs live on the reservation. As such, the defendants' activities giving rise to the dispute are within the territorial sovereignty of the tribe.

Further, the plaintiffs did business within the Navajo Nation and thus there is a consensusal link under United States v. Montana, 450 U.S. 544 (1981). This is

important since the U.S. Supreme Court make that an underpinning for civil jurisdiction over non-Indian in Montana. In that case, the Supreme Court held that a tribe may regulate the activities of nonmembers who enter consensusal relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements. Id. at 565. Here, the defendants chose to operate mills and mines on the reservation. It is assumed that in order to do business on the reservation agreements or dealings with the Navajo Nation were made which subjected defendants to tribal court civil jurisdiction. Arizona Public Services v. Office of Navajo Labor Relations, A-CV-08-87 (decided 1990).

Another aspect of Montana is that a tribe may retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe. Id. at 566. The facts before the court suggest that non-Indians operating uranium mines and mills threatens the tribe's political or economic security to justify tribal regulation. Commercial activities in the Navajo Nation must abide by Navajo Nation laws. In addition, the inherent dangers entailed in uranium mining and milling may threaten the welfare and safety of the Tribe. Thus, the defendants are within the jurisdiction of the Navajo courts.

CHOICE OF LAW

The defendants ask the court to defer to federal jurisdiction as a matter of comity. That is a reverse Farmer's Union claim. National Farmers Union Insurance Cos. et al. v. Crow Tribe of Indians et al., 471 U.S. 845 (9th Cir. 1985). That court believed that the existence and extent of a tribal court's jurisdiction requires an examination of tribal

sovereignty which should be conducted in the first instance in the Tribal Court evaluating the factual and legal bases for a jurisdictional challenge. Id. at 855-56.

The most recent Navajo Nation Supreme Court decision on comity is Rough Rock Community School v. Navajo Nation, No. SC-CV-06-94 (March 14, 1996). This is an "applicable law" decision and not a "deference to another sovereign" decision.

In Rough Rock the Navajo Supreme Court ruled that under the Navajo Nation doctrine of comity, a foreign statute, court decision or public act must comply with Navajo Nation public policy. The Navajo Nation is aware that economic development is important to the Nation. However, there are consequences for doing business on the Nation. Under the Navajo Nation's sovereign authority to regulate business, establish the rules for doing business within the Navajo Nation, or decide which acts of state of foreign jurisdictions will or will not be honored within the Navajo Nation is a matter of comity.

The Navajo Nation courts have the authority to apply any federal law that may be applicable. 7 NTC ss204(a). This action arose within the territorial jurisdiction of the Navajo Nation involving Navajo plaintiffs. The Navajo Nation courts have the power to apply federal law. Comity is not applicable in this case.

In addition, defendants claim they have a right to consolidate all related actions in the appropriate federal court because "nuclear energy issues are emotionally charged; scientific evidence on causation is complex; and damages claims are potentially gargantuan." Defendants brief at 32. argument that tribal courts are somehow biased or not competent enough to render just decisions. Iowa Mutual

Insurance Co. vs. La Plante, 480 U.S. 9, 19 (1987). Since this case cannot be removed to federal court, requiring the defendants to defend in the Navajo Nation court would not be unduly unfair or inconvenient. Defendants are encouraged to consolidate any related claims in this forum.

It is therefore, ORDERED that defendants Motion to Dismiss for Lack of Subject Matter Jurisdiction is hereby DENIED. The defendants are further encouraged to consolidate any related claims in this forum.

So ORDERED this 30th day of April, 1996.

[signed]
JUDGE, District Court of the Navajo Nation

UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

No. CIV 96-0049-PCT-RGS

EL PASO NATURAL GAS COMPANY, a Delaware Corporation,
Plaintiff,

v.

LAURA NEZTSOSIE and ARLINDA NEZTSOSIE,
Defendants.

Order Denying Plaintiff's Request for Preliminary Injunction and Granting Limited Injunction

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Transcript of Proceedings
May 28, 1996

THE COURT: The plaintiff's application for preliminary injunction is denied to the extent that it in any way seeks to have this Court declare any aspect the jurisdiction of the Navajo tribal court. There is -- there is a set of differing views as to what this lawsuit involves. And when I say "this lawsuit," I mean the lawsuit brought by the defendants here as plaintiffs against El Paso Natural Gas in the tribal court.

The Navajo tribal court may or may not be presented with the issue of whether or not it has jurisdiction over all aspects of this case, that is to say this case should it include claims

under the Price-Anderson Act as well as simply claims of negligence and other bases for a tort claim.

The Court does grant El Paso Natural Gas Company's requested relief to the extent that it enjoins the named defendants here, plaintiffs in the tribal court, from pursuing a Price-Anderson Act complaint in tribal Court. The Court's rationale for granting that limited aspect of the relief is application of the *National Farmer*'s three-factor test to the issues involved plus a consideration of the holdings in the case decided in this District Court in 1981, UNC Resources versus Benally.

In citing that case, I recognize that there are significant variations in the contacts, but taking the relevant analysis, the Court does that in supporting its limited grant of relief to the El Paso Natural Gas Company here by way of the preliminary injunction granted.

Now, I want it clear to the parties as to what is granted here and what is not granted here, and what the parties can and can't do in tribal court. The parties are enjoined from pursuing, as I said earlier, a cause of action in tribal court based upon the Price-Anderson Act for the reasons stated.

If the plaintiffs in that court want to, in effect, test the extent to which the Navajo tribal court believes it has jurisdiction, presumably it might be able to seek declaratory relief in that court from the tribal court as to its opinions as to its -- extent of its jurisdiction. And that is consistent with the Court's disinclination to in any way impede the jurisdiction of the tribal court in exploring its powers.

It is a case of importance in the sense that there's no doubt but what the operation of a facility on the -- on tribal lands that may affect a broad segment of tribal population from a health standpoint or otherwise is a matter of dramatic and significant concern to the tribe and to its government.

It is, of course, also true that the United States has a very strong and compelling interest to assure that it operates its nuclear industry in all of its varying facets in a manner that is

uniformly appropriate for all who are exposed to both its benefits and its burdens. And because of the uniqueness of the geographic location of the sovereign tribal governments within the boundaries of the United States, it compounds this problem and, of course, also in part of that mix of complexity is the power, burden and responsibility of Congress to enact laws concerning the sovereign Indian nations within the United States.

It is the Court's belief that its ruling in this area preserves tribal sovereignty in its fullest measure, but at the same time recognizes the interests that have been argued concerning the nuclear industry, for lack of a better word, within the United States.

It's hoped that this will enable the parties to clarify the issue within the tribal court of its jurisdiction. It may be that it will conclude that on this narrow area it lacks jurisdiction or defers jurisdiction or is otherwise willing to permit claims to be adjudicated not in its own forum, or it may feel that clearly it does have it and if that's true, why then presumably there will be opportunities to test that decision within its own legal structure and there may be other occasions upon which that can be tested as well and in the United States District Court or in other courts.

I hope I've helped to clear and not muddy the waters that have been brought to me by this litigation.

Order

STRAND, Judge:

On May 28, 1996, plaintiff El Paso Natural Gas Company's application for a preliminary injunction of all tribal proceedings in the case of *Neztsosie v. El Paso Natural Gas Company*, Court of the Navajo Nation, District of Tuba

City, Case No. TC-CV-0052-95, came on for hearing. After considering the parties' written motions, their supporting memoranda, and oral argument of counsel both at the hearing on May 28, 1996, and at a telephonic hearing regarding the wording of this order on July 11, 1996, this Court makes the following ruling pursuant to Federal Rule of Civil Procedure 65(d):

Plaintiff El Paso Natural Gas Company's Application for Preliminary Injunction is denied to the extent that it in any way seeks to have this Court rule on any aspect of jurisdiction of the Navajo tribal court. This Court denies El Paso Natural Gas Company's request for an injunction of tribal proceedings in *Neztsosie v. El Paso Natural Gas Company*, except to the extent that Laura and Arlinda Neztsosie seek relief based upon the Price-Anderson Act in tribal court. In all other respects, the relief sought by the plaintiff in its application for preliminary injunction is denied.

In reaching this decision, this Court relies on the principles of tribal sovereignty, the tribal exhaustion doctrine, the factors set forth in *National Farmers Union Ins. Co. v. Crow Tribe of Indians*, 471 U.S. 845 (1985), *UNC Resources, Inc. v. Benally*, 518 F.Supp. 1046 (D. Ariz. 1981), and on arguments and authorities presented by the parties in their papers and oral argument. In reaching this decision, the Court does not determine whether or not the provisions of the Price-Anderson Act have any application to the claims asserted by Laura and Arlinda Neztsosie in tribal court. It is further

ORDERED, approving cash bond in the amount of ONE THOUSAND and 00/100 DOLLARS ($1,000.00) in support of this injunction pursuant to Federal Rule of Civil Procedure 65(c).

SO ORDERED on this 3rd day of November, 1996.

Hon. Roger G. Strand
Judge of the United States District Court

UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

No. CIV 96-01524-PCT-RGS

CYPRUS FOOTE MINERALS COMPANY,
a Pennsylvania Corporation, et al.,
Plaintiffs,

v.

ZONNIE MARIE DANDY RICHARDS,
individually and as representative of
the Estate of Harold J. Richards, Sr.,
Defendant.

Order

Plaintiff has filed this action seeking an order enjoining Defendant from pursuing the lawsuit of *Zonnie Marie Dandy Richards (The State of Harold J. Richards, Sr., Deceased) v. Texas Zinc, et al.*, which is pending in the District Court of the Navajo Nation, Kayenta District, No. KY-CV-002-95. Plaintiffs have filed an application for preliminary injunctive relief. After considering the parties' pleadings, the Court makes the following ruling:

Plaintiffs' application for a preliminary injunction is denied to the extent that it seeks to have this Court decide whether the Navajo tribal court has jurisdiction over the case before it. Further, Plaintiffs' request for an injunction of the tribal proceeding in *Zonnie Marie Dandy Richards (The State of Harold J. Richards, Sr., Deceased) v. Texas Zinc, et al.* is

denied except to the extent that Defendant seeks relief under the Price-Anderson Act in tribal court.

The Court bases its decision on the principles of tribal sovereignty, the tribal exhaustion doctrine, the factors set forth in *National Farmers Union Ins. Co. v. Crow Tribe of Indians*, 471 U.S. 845 (1985), *UNC Resources, Inc. v. Benally*, 518 F. Supp. 1046 (D. Ariz. 1981), and the additional authorities cited by the parties in their pleadings.

In reaching this decision, the Court does not determine whether or not the provisions of the Price-Anderson Act have any application to the claims asserted by Defendant in tribal court.

Accordingly,

IT IS ORDERED granting in part and denying in part Plaintiffs' Application for Preliminary Injunction (doc. #2).

FURTHER ORDERED approving a cash bond in the amount of ONE THOUSAND DOLLARS ($1000.00) in support of this injunction pursuant to Federal Rule of Civil Procedure 65(c).

DATED this 21st day of NOVEMBER, 1996.

[signed]

HONORABLE ROGER G. STRAND
U.S. DISTRICT COURT JUDGE

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

EL PASO NATURAL GAS COMPANY,
a Delaware Corporation,
Plaintiff-Appellant,

v.

LAURA NEZTSOSIE; ARLINDA NEZTSOSIE,
Defendants-Appellees.

No. 96-17121
DC No. CV-96-00049-RGS

CYPRUS FOOTE MINERAL COMPANY,
a Pennsylvania Corporation;
CYPRUS AMAX MINERAL COMPANY,
a Delaware Corporation,
Plaintiffs-Appellants,

v.

ZONNIE MARIE DANDY RICHARDS,
individually and as representative
of the Estate of Harold J.Richards, Sr.,
Defendant-Appellee.

No. 96-17139
DC No. CV-96-01524-RGS

Appeals from the United States District Court
for the District of Arizona

Filed February 11, 1998
Amended April 27, 1998

Before: Judges Harry Pregerson, Warren J. Ferguson, and Andrew J. Kleinfeld, Circuit Judges

Opinion by Judge Pregerson; Dissent by Judge Kleinfeld

OPINION

PREGERSON, Circuit Judge:

Members of the Navajo Nation (the "Navajo Court Plaintiffs") filed two separate actions in Navajo Tribal Court against corporations that conducted uranium mining operations on the Navajo Nation Reservation. The Navajo Court Plaintiffs alleged personal injury and wrongful death claims based on Navajo common law. In response to those actions, El Paso Natural Gas Company ("El Paso") and Cyprus Foote Mineral Company and Cyprus Amax Minerals Company (collectively "Cyprus") filed two separate suits in federal district court seeking preliminary injunctions to enjoin the Navajo Tribal Court from asserting jurisdiction over the Navajo Court Plaintiffs' claims. El Paso and Cyprus (collectively the "mining companies") alleged that all actions arising from "nuclear incidents" fall within the Price-Anderson Act, 42 U.S.C. § 2011 *et seq.*, and must be litigated in federal court.

The district court granted in part, and denied in part, the mining companies' requests for preliminary injunctions. The district court granted the preliminary injunctions to the extent the Navajo Court Plaintiffs alleged claims under Price-Anderson. The district court denied the preliminary injunctions, however, to the extent the Navajo Court Plaintiffs did not allege Price-Anderson claims. We have jurisdiction under 28 U.S.C. § 1292(a)(1). We affirm in part and reverse in part.

FACTS AND PRIOR PROCEEDINGS

The two actions filed by the Navajo Court Plaintiffs have been consolidated for this appeal. The facts and prior proceedings in each of these actions are as follows:

1. *Neztsosie v. El Paso*

Between 1956 and 1959, Rare Metals Corporation of America ("Rare Metals"), a now defunct subsidiary of El Paso, conducted uranium mining operations on the Navajo Nation Reservation. On March 29, 1995, Laura and Arlinda Neztsosie (the "Neztsosies"), members of the Navajo Nation, filed suit against Rare Metals in Navajo Tribal Court. The Neztsosies asserted claims for personal injuries arising from Rare Metals' uranium mining activities.

On January 5, 1996, El Paso filed suit against the Neztsosies in the United States District Court for the District of Arizona. El Paso sought a preliminary injunction enjoining the Neztsosies from prosecuting their claims in the Navajo Tribal Court. El Paso also sought a declaration that the Navajo Tribal Court had no jurisdiction over the Neztsosies's claims. El Paso asserted that the Neztsosies had to litigate their claims in federal court because their claims alleged liability arising from a "nuclear incident" under the Price-Anderson Act, 42 U.S.C. §§ 2014, 2210.

After a hearing, District Court Judge Robert G. Strand, entered an order denying in part, and granting in part, El Paso's request for a preliminary injunction. The district court denied El Paso's request for a preliminary injunction "to the extent that it in any way seeks to have this Court rule on any aspect of jurisdiction of the Navajo tribal court . . . except to the extent that [the Neztsosies] seek relief based upon the Price-Anderson Act in tribal court." In reaching its decision, the district court relied on "principles of tribal sovereignty" and the "tribal exhaustion doctrine." The district court stated,

however, that it did not determine whether Price-Anderson had any application to the claims asserted by the Neztsosies in Tribal Court.

2. *Richards v. Cyprus*

Cyprus Foote Mineral Company is the successor by merger to Vanadium Corporation of America ("VCA"). From the 1940's through the 1960's, VCA operated a uranium mine in Cane Valley, Arizona, known as Monument No. 2 mine. During the 1960's, VCA also constructed and operated a uranium concentrator at the Monument No. 2 mine site. The remnants of the ore concentrating process consisted of uranium tailings. The tailings produced by the concentrator were stored on a tailings pile on land adjacent to the Monument No. 2 mine site.

On April 20, 1995, Zonnie Marie Dandy Richards, a member of the Navajo Nation, filed suit individually, and as representative of her deceased husband's estate, against VCA and others in Navajo Tribal Court. Richards asserted claims for wrongful death and personal injuries arising from VCA's activities at the Monument No. 2 mine site.

On June 26, 1996, Cyprus filed suit against Richards in the United States District Court for the District of Arizona. Like El Paso, Cyprus sought a preliminary injunction enjoining Richards from prosecuting her claims in Navajo Tribal Court. Cyprus also sought a declaration that the Navajo Tribal Court had no jurisdiction over Richards's claims. Cyprus alleged that Richards had to litigate her claims in federal court because she alleged liability arising from a "nuclear incident" under Price-Anderson.

The Richards action, like the Neztsosie action, was assigned to District Court Judge Strand. The district court entered an order substantially similar to the order issued in the Neztsosie matter. The district court denied in part, and granted in part, Cyprus's request for a preliminary injunction.

El Paso and Cyprus timely appeal the district court's orders.

STANDARD OF REVIEW

We review de novo whether the district court was required to abstain from granting or denying an injunction when a party has failed to exhaust tribal court remedies. *Burlington N. R.R. v. Red Wolf*, 106 F.3d 868, 869-70 (9th Cir. 1997) (en banc).

I. The Tribal Exhaustion Requirement

The Supreme Court has stated that, subject to certain exceptions, comity principles require federal courts to either dismiss or abstain from deciding cases in which a party asserts that concurrent jurisdiction exists in an Indian tribal court. *Crawford v. Genuine Parts Co.*, 947 F.2d 1405, 1407 (9th Cir. 1991) (citing *National Farmers Un. Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845 (1985) and *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9 (1987)). "Considerations of comity require the exhaustion of tribal remedies before the [tribal court's jurisdiction] may be addressed by the district court." *Wellman v. Chevron USA, Inc.*, 815 F.2d 577, 578 (9th Cir. 1987). "The requirement of exhaustion of tribal remedies is not discretionary; it is mandatory." *Burlington N. R.R. v. Crow Tribal Council* ("*Crow Tribal Council*"), 940 F.2d 1239, 1245 (9th Cir. 1991). "Until petitioners have exhausted the remedies available to them in the Tribal Court system, it would be premature for a federal court to consider any relief." *National Farmers*, 471 U.S. at 857 (footnote omitted); *see also Yellowstone County v. Pease*, 96 F.3d 1169, 1171 (9th Cir. 1996), *cert. denied*, 117 S. Ct. 1691 (1997) ("[A] party *must* exhaust tribal court remedies before a federal district court may entertain a challenge to tribal jurisdiction.") (emphasis added); *Crow Tribal Council*, 940 F.2d at 1244

("[F]ederal courts should not even make a ruling on tribal court jurisdiction until tribal remedies are exhausted.") (citation omitted).

"[T]he initial determination of whether the Tribe has jurisdiction lies with the tribal court alone." *Crow Tribal Council*, 940 F.2d at 1244. "[N]on-Indian defendants *must exhaust tribal court* remedies before seeking relief in federal court, even where defendants allege that proceedings in tribal court exceed tribal sovereign jurisdiction." *Id.*

The tribal exhaustion requirement is based on considerations of comity and the long-standing policy of promoting tribal self-government and self-determination. *National Farmers*, 471 U.S. at 856. "[T]he federal policy supporting tribal self-government directs a federal court to stay its hand in order to give the tribal court a 'full opportunity to determine its own jurisdiction.'" *Iowa Mut.*, 480 U.S. at 16 (quoting *National Farmers*, 471 U.S. at 857).

The existence and extent of a tribal court's jurisdiction require a careful examination of tribal sovereignty. "[T]hat examination should be conducted in the first instance in the Tribal Court itself." *National Farmers*, 471 U.S. at 856. "[P]roper respect for tribal legal institutions requires that they be given a 'full opportunity' to consider the issues before them and 'to rectify errors.'" *Iowa Mut.*, 480 U.S. at 16 (citing *National Farmers*, 471 U.S. at 857).

While tribal exhaustion promotes tribal self-government and self-determination, it also promotes judicial efficiency:

> [T]he orderly administration of justice in the federal court will be served by allowing a full record to be developed in the Tribal Court before either the merits or any question concerning appropriate relief is addressed . . . . Exhaustion of tribal court remedies, moreover, will encourage tribal courts to explain to the parties the precise basis for accepting jurisdiction, and will also provide other courts with the benefit of

their expertise in such matters in the event of further judicial review.

National Farmers, 471 U.S. at 856-57. "Congress is committed to a policy of supporting tribal self-government and self-determination. That policy favors a rule that will provide the forum whose jurisdiction is being challenged the first opportunity to evaluate the factual and legal bases for the challenge." *Id.* at 856.

In this case, the mining companies have not exhausted their tribal court remedies. Instead, the mining companies chose to file actions in federal district court seeking to enjoin the Navajo Tribal Court from asserting jurisdiction over the Navajo Court Plaintiffs' claims. *See Iowa Mut.*, 480 U.S. at 17 ("At a minimum, exhaustion of tribal remedies means that tribal appellate courts must have the opportunity to review the determinations of the lower tribal courts."). Thus, unless an exception to the tribal exhaustion requirement applies, the district court was obligated to abstain from ruling on the tribal court's jurisdiction over the Navajo Court Plaintiffs' common law claims.

An exception to the tribal exhaustion requirement exists where: (1) an assertion of tribal jurisdiction is motivated by a desire to harass or is conducted in bad faith; (2) tribal court jurisdiction patently would violate express jurisdictional prohibitions; (3) exhaustion would be futile because of the lack of an adequate opportunity to challenge the tribal court's jurisdiction; or (4) no federal grant authorizes tribal governance of nonmembers' conduct on land covered by *Montana*'s main rule. *See Strate v. A-1 Contractors*, ___ U.S. ___, 117 S. Ct. 1404, 1416 n.14 (1997); *National Farmers*, 471 U.S. 845 at 856 n.21. In this case, the parties only dispute the applicability of the "express jurisdictional prohibition" exception to tribal court jurisdiction. "A substantial showing must be made by the party seeking to invoke [the 'express jurisdictional prohibition'] exception to

the tribal exhaustion rule." *Kerr-McGee Corp. v. Farley ("Farley")*, 115 F.3d 1498, 1502 (10th Cir. 1997). "[T]ribal courts rarely lose the first opportunity to determine jurisdiction because of an 'express jurisdictional prohibition.'" *Id.*

II. The District Court's Orders

In this case, the district court's orders appear to hold that Price-Anderson constitutes an express prohibition of tribal court jurisdiction. The district court denied the mining companies' requests for preliminary injunctions "except to the extent that [the Navajo Court Plaintiffs] seek relief based upon the Price-Anderson Act in tribal court." The district court also stated that it did not determine whether Price-Anderson had any application to the claims asserted by the Navajo Court Plaintiffs.

The mining companies have appealed that portion of the district court's orders that allow the Navajo Court Plaintiffs to pursue claims in Navajo Tribal Court other than Price-Anderson claims. The mining companies assert that the Navajo Court Plaintiffs are barred from pursuing any claims in Navajo Tribal Court because the Navajo Court Plaintiffs' claims arise from a nuclear tort and fall within the ambit of Price-Anderson.

The Navajo Court Plaintiffs, on the other hand, have not appealed the district court's rulings that Price-Anderson constitutes an express prohibition of tribal court jurisdiction. Rather, the Navajo Court Plaintiffs seek to affirm that portion of the district court's orders that allow them to pursue claims other than Price-Anderson claims in Navajo Tribal Court. The Navajo Court Plaintiffs contend that their claims are based on Navajo common law and do not implicate Price-Anderson.

It is unclear why the Navajo Court Plaintiffs have not appealed the district court's rulings that Price-Anderson constitutes an express jurisdictional prohibition that prevents

the Navajo Tribal Court from determining its jurisdiction over such claims. Nevertheless, because of the important comity considerations involved, we *sua sponte* examine whether Price-Anderson constitutes an express prohibition of tribal court jurisdiction. *See Stone v. City and County of San Francisco,* 968 F.2d 850, 855 (9th Cir. 1992) ("Issues touching on federalism and comity may be considered *sua sponte*.").[1]

As the following discussion demonstrates, we conclude that Price-Anderson does not contain an express jurisdictional prohibition barring the Navajo Tribal Court from determining its jurisdiction over the Navajo Court Plaintiffs' claims. Therefore the mining companies, before proceeding in federal court, are obligated to first exhaust their tribal court remedies.

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[1]Our decision to review this issue *sua sponte* is further supported by: (1) the Tenth Circuit's recent decision in *Farley,* 115 F.3d at 1505, which expressly rejected the claim that Price-Anderson constitutes an express jurisdictional prohibition; and (2) the district court's misplaced reliance on *UNC Resources, Inc. v. Benally,* 518 F. Supp. 1046 (D. Ariz. 1981), in considering the tribal exhaustion doctrine.

In *Benally*, a corporation operating a uranium mill near the Navajo reservation brought an action in federal district court to enjoin several members of the Navajo Nation from proceeding in Navajo Tribal Court on civil actions alleging personal injuries and property damage arising from the corporation's activities. *Id.* at 1048. The district court concluded that the tribal court had no jurisdiction. *Benally* is not dispositive, however, because it was decided before the Supreme Court announced the tribal exhaustion doctrine in *National Farmers*. Moreover, the conduct at issue in Benally took place off the reservation, whereas in this case the alleged conduct took place on the Navajo Nation Reservation. Tribal jurisdiction applies more clearly to conduct occurring on reservation lands. *See Iowa Mut.*, 480 U.S. at 18 ("Tribal authority over the activities of non-Indians on reservation lands is an important part of tribal sovereignty.") (emphasis added); *Crawford,* 947 F.2d at 1408 ("When the dispute is a 'reservation affair' . . . there is no discretion not to defer.").

III. Price-Anderson

The mining companies assert that Price-Anderson and its legislative history mandate exclusive federal court jurisdiction for claims arising from "nuclear incidents." The mining companies also assert that we may infer an express jurisdictional prohibition. These contentions are not persuasive.

Before 1954, a federal monopoly existed over the use, control, and ownership of nuclear technology. *Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n,* 461 U.S. 190, 206 (1983). In 1954, however, Congress passed the Atomic Energy Act to encourage the private sector to become involved in the development of atomic energy under federal regulation. *Id.* at 206-07.

In 1957, Congress enacted Price-Anderson. Price-Anderson amended the Atomic Energy Act by creating specific protections for the nuclear industry from tort liability. *See Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 251 (1984). Price-Anderson contains three distinct elements. First, it sets a ceiling on the aggregate damage award for nuclear tort claims that can be imposed against an entity involved in the use or handling of radioactive material. *In re TMI Litig. Cases Consol. II,* 940 F.2d 832, 852 (3d Cir. 1991). Second, it indemnifies any entity exposed to potential liability for activity resulting in a nuclear incident, even if the entity did not directly participate in the activity. *Id.* Third, Price-Anderson established an indemnification program through which the federal government would require entities involved in nuclear activities to obtain private insurance to a certain level, and then the federal government would pay all public liability claims above that liability ceiling. *Farley,* 115 F.3d at 1503.

Until amended in 1988, Price-Anderson's provisions regarding nuclear tort litigation did not apply unless and until the Nuclear Regulatory Commission ("NRC") determined that

an "extraordinary nuclear occurrence" had transpired. *O'Conner v. Commonwealth Edison Co.*, 13 F.3d 1090, 1095-96 (7th Cir. 1994). The 1988 amendments to Price-Anderson expanded its reach to include all "public liability actions" and eliminated the requirement that the NRC designate an extraordinary nuclear occurrence. 42 U.S.C. § 2210(n)(2). *See also* S. Rep. No. 218, 100th Cong., 1st Sess. 2, at 13 (1987) ("Any suit asserting public liability shall be deemed to be an action arising under the Price-Anderson Act."); H.R. Rep. No. 104, 100th Cong., 1st Sess., pt. 1 (same).

Price-Anderson states:

> With respect to any public liability action arising out of or resulting from a nuclear incident, the United States district court in the district where the nuclear incident takes place . . . shall have original jurisdiction without regard to the citizenship of any party or the amount in controversy. Upon motion of the defendant . . . any such action pending in any State court . . . or United States district court shall be removed or transferred to the United States district court having venue under this subsection.

42 U.S.C. § 2210(n)(2). Price-Anderson defines "public liability action" as "any suit asserting public liability." *Id.* § 2014(hh). "Public liability means any legal liability arising out of or resulting from a nuclear incident." *Id.* § 2014(w). A "nuclear incident means any occurrence . . . within the United States causing . . . bodily injury, sickness, disease, or death . . . arising out of or resulting from the radioactive,

toxic, explosive, or other hazardous properties of source,[2] special nuclear, or byproduct material."[3] *Id.* § 2014(q).

"Although the public liability cause of action is built around preexisting state law, it contains some distinctively federal elements as well." *O'Conner*, 13 F.3d at 1096; see also 42 U.S.C. § 2014(hh) ("The substantive rules for decision in [a public liability] action shall be derived from the law of the State in which the nuclear incident involved occurs, unless such law is inconsistent with the provisions of [42 U.S.C. § 2210]."). For example, Price-Anderson as amended in 1988 provides the limitations period for public liability actions, 42 U.S.C. § 2210(n)(1), provides for venue, *id.* § 2210(n)(2), limits the availability of punitive damages in an action arising out of an extraordinary nuclear occurrence, *id.* § 2210(s), and mandates the waiver of normally-available defenses in the case of extraordinary nuclear occurrences. *Id.* § 2210(n)(1).

IV. Price-Anderson does not Constitute an Express Jurisdictional Prohibition

One exception to the tribal exhaustion requirement calls for an *express* jurisdictional prohibition. *See National Farmers*, 471 U.S. at 857 n.21. This exception rarely applies. *See Farley*, 115 F.3d at 1502 (noting that a tribal court "rarely" loses the opportunity to determine its jurisdiction because of an express jurisdictional prohibition). "Civil jurisdiction over the activities of non-Indians on reservation lands 'presumptively lies in the tribal courts unless *affirmatively* limited by a specific treaty provision or federal

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[2] "[S]ource material means (1) uranium, thorium, . . . or (2) ores containing one or more of the foregoing materials." 42 U.S.C. § 2014(z).

[3] "[B]yproduct material" includes "the tailings or wastes produced by the extraction or concentration of uranium or thorium from any ore processed primarily for its source material content." 42 U.S.C. § 2014(e).

statute.'" *Stock West, Inc. v. Confederated Tribes of the Colville Reservation*, 873 F.2d 1221, 1228 (9th Cir. 1989) (emphasis added) (quoting *Iowa Mut.*, 480 U.S. at 18).

Price-Anderson contains no such *express* prohibition of tribal court jurisdiction. Price-Anderson provides for *concurrent* rather than exclusive jurisdiction over claims arising from nuclear incidents. It merely grants defendants the *right*, rather than the obligation, to remove such cases to federal court. *See* 42 U.S.C. § 2210(n)(2) ("Upon motion of the defendant . . . any such action pending in any State court . . . shall be removed or transferred to the United States district court having venue under this subsection.").[4]

In *Farley*, the Tenth Circuit held that Price-Anderson does not constitute an express jurisdictional prohibition. In that case, certain members of the Navajo Nation filed an action in the Navajo Tribal Court against two mining companies. The mining companies had conducted operations on the Navajo Nation Reservation between 1952 and 1973. *Farley*, 115 F.3d at 1500. The plaintiffs alleged that the mining companies' mill released vast quantities of radioactive and toxic materials, which caused injuries. *Id.* The mining companies, without answering the tribal court complaint, filed an action in federal district court seeking to enjoin the suit from proceeding in the tribal court. *Id.* The mining

[4]The mining companies' reliance on *United States v. White Mountain Apache Tribe*, 784 F.2d 917 (9th Cir. 1986) and *United States v. Yakima Tribal Court*, 806 F.2d 853 (9th Cir. 1986) is misplaced. In *White Mountain*, we stated: "There is no point in requiring exhaustion . . . because tribal court jurisdiction is clearly foreclosed by the sovereign immunity of the United States." *White Mountain*, 784 F.2d at 920 n.10; *see also Yakima*, 806 F.2d at 861 (following *White Mountain*). Unlike *White Mountain* and *Yakima*, in this case, Navajo Tribal Court jurisdiction is not "clearly foreclosed" by Price-Anderson. Moreover, it is for the Navajo Tribal Court to first determine whether the Navajo Court Plaintiffs have even asserted Price-Anderson claims.

companies asserted that Price-Anderson constitutes an express jurisdictional prohibition of tribal court suits involving nuclear torts. Thus, they argued that they had no obligation to exhaust tribal court remedies. *Id.*

The district court disagreed and stated that the "Price-Anderson Act and its amendments are devoid of any mention of 'Indians,' 'tribes,' or 'tribal-court jurisdiction.'" *Kerr-McGee Corp. v. Farley*, 915 F. Supp. 273, 277 (D.N.M. 1995), *aff'd*, 115 F.3d 1498 (10th Cir. 1997). The district court further noted:

> The Price-Anderson Act does not affirmatively limit tribal court jurisdiction. Although Congress has plenary power to define the jurisdiction of tribal courts, it did not exercise that power, when it drafted the Price-Anderson Act. The Act makes no reference to Indians and nothing in the legislative history suggests any intent to render inoperative the established policy promoting tribal self-government.

915 F. Supp. at 280 (citation omitted).

The Tenth Circuit affirmed the district court's decision to stay all proceedings before it until the mining companies exhausted their tribal court remedies. The Tenth Circuit noted: "The 1988 amendments [to Price-Anderson] do not explicitly create *exclusive* federal court jurisdiction over nuclear incident litigation." *Farley*, 115 F.3d at 1504.[5]

[5]At oral argument, the mining companies contended that the Supreme Court's recent decision in *Strate* controlled this case. In *Strate*, the Supreme Court found that, absent a treaty or statute, an Indian tribe lacked jurisdiction over a dispute between nonmembers of the tribe when that dispute arose from an accident occurring on a state highway within the reservation. *Strate*, 117 S. Ct. at 1407-08. The Court noted that, when a tort occurs on alienated land, the tribal court will have jurisdiction over the

The mining companies contend that cases interpreting the 1988 Price-Anderson amendments recognize the Act's exclusivity. *See Nieman v. NLO, Inc.*, 108 F.3d 1546, 1553 (6th Cir. 1997) ("[A plaintiff] can sue under the Price-Anderson Act, as amended, or not at all."); *In re TMI Litig.*, 940 F.2d at 854 ("A claim growing out of any nuclear incident is compensable under the terms of the [1988

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claim only where the tribe regulates one of two situations discussed in *Montana v. United States*, 450 U.S. 544, 67 L. Ed. 2d 493, 101 S. Ct. 1245 (1981): (1) consensual relationships between nonmembers and the tribe, or (2) conduct which "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Montana*, 450 U.S. at 566.

We find *Strate* inapposite to the facts of this case because the incident in *Strate* arose from a traffic accident on a state highway within the tribe's reservation. The *Strate* Court placed great emphasis on the fact that the state highway was open to the public and controlled and maintained by the state. *Strate*, 117 S. Ct. at 1414. Conversely, in this case the Navajo Nation retained tribal sovereignty over the land the mining companies occupied, which land was neither open to the public nor controlled or maintained by any entity other than the tribe. The *Strate* Court expressly declined to address cases, like the present one, where the disputed tort involved nonmembers of the tribe and occurred on tribal land. *See id.* at 1408 ("We express no view on the governing law or proper forum when an accident occurs *on a tribal road* within a reservation.") (emphasis added). Because this case is distinguishable from *Strate*, we need not consider whether a *Montana* exception applies. It seems indisputable, however, that a claim involving uranium contamination poses a danger to the 'health or welfare of the tribe.'

The dissent contends that *Burlington N. R.R. Co. v. Red Wolf*, 106 F.3d 868 (9th Cir. 1996), *vacated*, 118 S. Ct. 37 (1997) has expanded *Strate*, and that those two cases control the outcome here. In *Red Wolf*, we held that a railroad sued for a tort arising on a reservation must exhaust its tribal court remedies before a district court can exercise jurisdiction. The Supreme Court vacated our decision in *Red Wolf* and instructed us to reconsider our holding in light of *Strate*. But here, unlike in *Red Wolf*, there is no question that the Navajo Nation retained its sovereignty over the mine sites.

Amendments to the Act] or *it is not compensable at all.*"); *O'Conner*, 13 F.3d at 1099 ("The broad definition of 'public liability action' embodied in the Price-Anderson Act implies that Congress has exercised power under Article I and has enacted a new and independent, indeed exclusive, cause of action."). These cases are inapplicable, however, because they only address federal-state jurisdictional issues relating to Price-Anderson. They do not address Indian tribes or tribal sovereignty.

"Indian tribes occupy a unique status under our law." *National Farmers*, 471 U.S. at 851. "The condition of the Indians in relation to the United States is perhaps unlike that of any other two people in existence . . . . The relation of the Indians to the United States is marked by peculiar and cardinal distinctions which exist nowhere else." *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 15-16 (1831).

Comity concerns differ between federal-state and federal-tribal jurisdiction:

> As in cases raising comity concerns regarding federal-state jurisdiction, comity concerns in federal-tribal jurisdiction arise out of mutual respect between sovereigns. In the realm of federal-tribal jurisdiction, however, Congress has expressed an additional interest in promoting the development of tribal sovereignty. The Supreme Court has recognized this congressional intent and assiduously advocated federal abstention in favor of tribal courts.

Smith v. Moffett, 947 F.2d 442, 445 (10th Cir. 1991). Thus, even if Price-Anderson preempts *state court* jurisdiction -- still an open question in this circuit -- there is no express prohibition of *tribal court jurisdiction*.

The Supreme Court has also recognized that comity concerns differ between federal-state and federal-tribal jurisdiction. In *Iowa Mut. Ins. Co. v. LaPlante*, the Supreme Court refused to infer that the diversity statute, 28 U.S.C. § 1332, divested tribal courts of jurisdiction in diversity actions. *Iowa Mut.*, 480 U.S. at 17-18. The Supreme Court stated that § 1332 "makes no reference to Indians and nothing in the legislative history suggests any intent to render inoperative the established federal policy promoting tribal self-government." *Id.* at 17.

The Supreme Court noted: "'Because the Tribe retains all inherent attributes of sovereignty that have not been divested by the Federal Government, the proper inference from silence . . . is that the sovereign power . . . remains intact.'" *Id.* at 18 (quoting *Merrion v. Jicarilla Apache Tribe,* 455 U.S. 130, 149 n.14 (1982)). Thus, the Court held that "in the absence of any indication that Congress intended [§ 1332] to limit the jurisdiction of the tribal courts, we decline . . . to hold that tribal sovereignty can be impaired in this fashion." *Id.*

We have also refused to infer a prohibition of tribal court jurisdiction absent express language in addressing 28 U.S.C. § 1355. *United States v. Plainbull,* 957 F.2d 724 (9th Cir. 1992). Section 1355 states: "The district courts shall have original jurisdiction, exclusive of the courts of the States" over certain actions brought by the federal government. 28 U.S.C. § 1335 (emphasis added). We noted that the plain language of § 1355 "only grants the district court original jurisdiction 'exclusive of the courts of the States,' not exclusive of all other courts that would otherwise have had jurisdiction. Since a tribal court is not a state court, we hold that it does not fall within the exclusive jurisdiction provision of section 1355." *Id.*

The mining companies rely on *Lower Brule Constr. Co. v. Sheesley's Plumbing & Heating Co.*, 84 B.R. 638 (D.S.D. 1988) in asserting that tribal jurisdiction can be

limited absent an express jurisdictional prohibition. This claim is also without merit. In *Brule*, the Tribal Housing Authority asserted that the tribal court had jurisdiction over a bankruptcy action. *Id.* at 640. The district court disagreed, however, and concluded that the tribal court's civil jurisdiction was "unlimited only in relation to matters of Indian self-government." *Id.* at 641. The district court reasoned that requiring tribal courts to perform as bankruptcy courts "would not promote self-government among the Indian tribes, even assuming that a body of 'bankruptcy' law existed in tribal court." *Id.* The court further noted: "The Bankruptcy Code makes no reference to Indians or tribal courts and there is no Congressional grant of authority for Indian tribal courts to assume jurisdiction over bankruptcy proceedings." *Id.* at 642.

Brule is of limited guidance in this case. First, we have already determined that an express jurisdictional prohibition is required to limit tribal court jurisdiction. See *Plainbull,* 957 F.2d at 726; *see also Farley,* 115 F.3d at 1505 ("Simply put, 'exclusive jurisdiction' is not conferred unless conferred explicitly."). Second, the tribe in Brule did not allege that it had a body of bankruptcy law which it could apply. In this case, however, the Navajo Court Plaintiffs have apparently asserted claims based on Navajo common law - an area clearly within the Navajo Tribal Court's expertise.[6]

Even if the issue were ambiguous, federal courts are "required to construe ambiguity in statutes on Indian affairs in favor of preserving Indian sovereignty." *Poodry v. Tonawanda Band of Seneca Indians,* 85 F.3d 874, 889 (2d Cir.), *cert. denied*, 117 S. Ct. 610 (1996). In this case,

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[6]The mining companies also contend that Price-Anderson is the exclusive method for bringing nuclear tort claims because Price-Anderson provides a means of consolidating claims and ensuring a fair and equitable distribution of funds to all those affected by a nuclear incident. This claim is unavailing because it merely seeks to "infer" a jurisdictional prohibition where no "express" jurisdictional prohibition exists.

members of the Navajo Nation have alleged claims for personal injury and wrongful death arising from activity occurring on the Navajo Nation Reservation. Allowing the Navajo Tribal Court to determine its jurisdiction over these claims will preserve Indian sovereignty.

CONCLUSION

For the reasons stated above, we hold that Price-Anderson does not constitute an express jurisdictional prohibition that prevents the Navajo Tribal Court from determining its jurisdiction over the Navajo Court Plaintiffs' claims for personal injury and wrongful death arising from activities occurring on the Navajo Nation Reservation.[7] Accordingly, we reverse that portion of the district court's orders granting the mining companies' requests for preliminary injunctions. We affirm that portion of the district court's orders denying the mining companies' requests for preliminary injunctions.

Because the Navajo Tribal Court is to determine in the first instance whether it has jurisdiction over the Navajo Court Plaintiffs' claims, we remand this matter to the district court to either enter a stay of all proceedings or dismiss the complaint without prejudice pending the exhaustion of tribal court remedies. *See Iowa Mut.*, 480 U.S. at 20 n.14.

AFFIRMED in part, REVERSED in part, and REMANDED.

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[7]In holding that Price-Anderson does not constitute an express jurisdictional prohibition, we need not consider the Navajo Court Plaintiffs' alternative claim that Price-Anderson does not apply because the mining companies had no indemnity agreement with the federal government. *See Silkwood*, 464 U.S. at 251-52 n.12 ("Government indemnification is available only to those required to maintain financial protection . . . and the liability limitation applies only to those who are indemnified.").

KLEINFELD, Circuit Judge, dissenting:

I respectfully dissent.

In these two lawsuits, three Navajo Indians sued El Paso Natural Gas Company, a Delaware corporation, and Cyprus Foote Mineral Company, a Pennsylvania corporation, in Navajo tribal court. The Richards case alleged death from cancer caused by radiation. The Neztsosies' case alleged that the Neztsosies and their cattle were poisoned by drinking water contaminated with radiation and heavy metals. The uranium mining occurred many years ago. In ruling on a motion for preliminary injunction, the district court ruled that tribal court proceedings were enjoined as to Price-Anderson claims, but not as to other claims, and did not rule on whether the Price-Anderson Act applied to claims asserted by plaintiffs in tribal court. Plaintiffs did not appeal the injunction against litigating Price-Anderson claims in tribal court, so it should be treated as law of the case. The corporations appealed denial of the preliminary injunction as to all claims not covered by Price-Anderson. The majority opinion lets the plaintiffs sue the corporations in tribal court on all their claims, Price-Anderson or not. That is incorrect.

The Price-Anderson Act, as originally enacted in 1957, did not create a federal tort cause of action, nor confer jurisdiction on the federal courts. *Kiick v. Metropolitan Edison Co.*, 784 F.2d 490, 493 (3d Cir. 19[illegible]; *Stibitz v. General Pub. Util. Corp.*, 746 F.2d 993, 997 (3d Cir. 1984). Congress amended the Act to expand federal jurisdiction to include claims arising from any "nuclear incident." *See O'Conner v. Commonwealth Edison Co.*, 13 F.3d 1090, 1096 (7th Cir. 1994).

The statute provides that federal district courts have original jurisdiction with respect to "any public liability action arising out of or resulting from a nuclear incident." 42 U.S.C. § 2210(n)(2). Cases brought in state courts "shall be

removed" to federal court. *Id.* "Public liability" in this statute means "any legal liability arising out of or resulting from a nuclear incident." 42 U.S.C. § 2014(w). A "nuclear incident" was defined as any occurrence arising out of the hazardous properties of nuclear materials that causes sickness, personal injury or death:

> any occurrence, including an extraordinary nuclear occurrence, within the United States causing, within or outside the United States, bodily injury, sickness, disease, or death, or loss of or damage to property, or loss of use of property, arising out of or resulting from the radioactive, toxic, explosive, or other hazardous properties of source, special nuclear, or byproduct material.

42 U.S.C. § 2014(q). I do not think there are any actions that can arise out of sickness or death resulting from the hazardous properties of nuclear material that are not Price-Anderson actions. That should be the end of the case, because the plaintiffs did not appeal the determination by the district court that Price-Anderson actions could not be asserted in tribal court.

Plaintiffs' claims for injury and death resulting from nuclear materials left over from uranium mining were Price-Anderson claims or nothing, and Price-Anderson claims must be brought in federal district court. Congress did not leave room for non-federal tribunals to interfere with nuclear development that Congress favored, or foster nuclear development it disfavored. Two circuits have held that the federal cause of action is exclusive. The Third Circuit stated:

> Congress clearly intended to supplant all possible state causes of action when the factual prerequisite of the statute are met . . . .

> Congress clearly considered the decisions of our court holding that Congress had not intended to create a federal cause of action for cases not based upon an extraordinary nuclear occurrence . . . . Congress then provided, in the [1988] Amendments Act, the clearest expression of intent that there be a federal cause of action arising directly under the Act.

In re TMI Cases Consolidated, 940 F.2d 832, 857 (3d Cir. 1991). The court concluded, "After the Amendments Act, no state cause of action based on public liability exists. A claim growing out of any nuclear incident is compensable under the terms of the Amendments Act or *it is not compensable at all.*" *Id.* at 854 (emphasis in original). In *O'Conner v. Commonwealth Edison Co.,* 13 F.3d 1090 (7th Cir. 1994), the Seventh Circuit similarly held: "A claim growing out of any nuclear incident is compensable under [Price-Anderson] or it is not compensable at all." *O'Conner,* 13 F.3d at 1099.

The majority should not have reached over the head of the parties to reverse on a matter not even raised, whether prosecution of Price-Anderson claims in tribal court should have been enjoined.

Because (1) it is law of the case, not appealed, that the tribal court lacks jurisdiction over Price-Anderson claims, and (2) there are no claims that can be made that are not Price-Anderson claims, it necessarily follows that (3) there are no claims that can be made in tribal court. There can be no claim for which exhaustion in tribal court can be required.

We made a somewhat similar exhaustion doctrine mistake in *Burlington Northern Railroad Co. v. Red Wolf,* 106 F.3d 868 (9th Cir.), vacated 118 S. Ct. 37, 139 L. Ed. 2d 5 (1997). The Supreme Court made short work of our error, vacating it in a memorandum decision for further consideration in light of *Strate v. A-1 Contractors,* 117 S. Ct. 1404 (1997). The Court held in *Strate,* 117 S. Ct. 1404

(1997), that exhaustion in tribal court is not required, where "it is plain that no federal grant of authority provides for tribal governance of nonmembers' conduct":

> When, as in this case, it is plain that no federal grant provides for tribal governance of nonmembers' conduct . . . covered by [*Montana v. United States*,' 450 U.S. 544 (1981)] main rule, it will be equally evident that tribal courts lack adjudicatory authority over disputes arising from such conduct. As in criminal proceedings, state or federal courts will be the only forums competent to adjudicate those claims. Therefore, when tribal-court jurisdiction over an action such as this one is challenged in federal court, the otherwise applicable exhaustion requirement, must give way, for it would serve no purpose other than delay.

Id. 1416 n.14. The majority has in footnote 5 attempted to limit *Strate* to its facts, as we might with a poorly reasoned decision of our own that had not stood up well over time. We cannot do that with a Supreme Court decision.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

EL PASO NATURAL GAS COMPANY,
a Delaware Corporation,
Plaintiff-Appellant,
v.

LAURA NEZTSOSIE; ARLINDA NEZTSOSIE,
Defendants-Appellees.

No. 96-17121
DC No. CV-96-00049-RGS

CYPRUS FOOTE MINERAL COMPANY,
a Pennsylvania Corporation;
CYPRUS AMAX MINERAL COMPANY,
a Delaware Corporation,
Plaintiffs-Appellants,
v.

ZONNIE MARIE DANDY RICHARDS,
individually and as representative
of the Estate of Harold J.Richards, Sr.,
Defendant-Appellee.

No. 96-17139
DC No. CV-96-01524-RGS

Appeals from the United States District Court
for the District of Arizona

April 27, 1998

Before: Judges Harry Pregerson, Warren J. Ferguson, and Andrew J. Kleinfeld, Circuit Judges

ORDER AMENDING OPINION AND DENYING PETITION FOR REHEARING EN BANC

The opinion filed on February 11, 1998 is amended as follows:

At Slip. Op. p. 1284, first full paragraph, lines 3-8:

Replace

"(2) tribal court jurisdiction "is patently violative of express jurisdictional prohibitions"; or (3) exhaustion would be futile because of the lack of an adequate opportunity to challenge the tribal court's jurisdiction. *National Farmers*, 471 U.S. 845 at 857 n.21 (emphasis added)."

with

"(2) tribal court jurisdiction patently would violate express jurisdictional prohibitions; (3) exhaustion would be futile because of the lack of an adequate opportunity to challenge the tribal court's jurisdiction; or (4) no federal grant authorizes tribal governance of nonmembers' conduct on land covered by Montana's main rule. *See Strate v. A-1 Contractors*, U.S. , 117 S. Ct. 1404, 1416 n.14 (1997); *National Farmers*, 471 U.S. at 856 n.21."

At Slip Op. p. 1291, n.5, first full paragraph, lines 2-3:

Replace

"*Strate v. A-1 Contractors*, U.S. , 117 S. Ct. 1404 (1997)"

with

"*Strate*"

At Slip Op. p. 1291, n.5, first full paragraph, line 7:

Replace

"*Id.* at 1407-08."

with

"*Strate*, 117 S. Ct. at 1407-08."

With these amendments, Judges Pregerson and Ferguson voted to deny the petition for rehearing, Judge Pregerson voted to reject the suggestion for rehearing en banc and Judge Ferguson so recommends. Judge Kleinfeld voted to grant the petition for rehearing and to accept the suggestion for rehearing en banc.

The full court has been advised of the en banc suggestion and no judge has requested a vote on it.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.